82-1184

No.:_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

PETER CICALE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

I. Whether there was sufficient "independent evidence" to connect petitioner to the alleged narcotics conspiracy so as to permit the statements of petitioner's alleged co-conspirators into evidence against petitioner.

II. Whether Fed.R.Evid. Rule 803(3) permits the use of statements of future intention against a person other than the declarant?

III. Whether the Court of Appeals may reject the trial court's analysis of the "independent evidence" connecting a defendant to a conspiracy and then rely upon wholly different evidence as a justification for admission of the co-conspirator evidence?

IV. Whether the evidence viewed in the light most favorable to the government, was sufficient to sustain petitioner's conviction?

List of the Parties

Apart from the party named in the caption of this Petition, the other parties involved in the trial were Frank DeSimone and Paul Spector, who were also convicted. Additionally, co-defendants John Messina and Edward Martinez pleaded guilty prior to trial.

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PETER CICALE,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Peter Cicale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York, (Connor, J.).

Opinions Below

The majority and dissenting opinions of the Court of Appeals, reported at 691 F.2d 95 (2d. Cir. 1982), appear in the appendix hereto at pp. 1a-29a. The opinion of the

United States District Court for the Southern District of New York appears in the appendix at pp. 32a-40a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was October 7, 1982. The petitioner filed a timely petition for rehearing, which was denied on November 16, 1982. App. pp. 30a-31a. This Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

Statutory Provision Involved in the Case

Federal Rule of Evidence, Rule 801(d)(2)(E):

> A statement is not hearsay if -
>
> (2) [Admission by a party-opponent.] The statement is offered against a party and is...[E] a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy.

Federal Rule of Evidence 803(3):

> The following are not excluded by the hearsay rule...:
>
> Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Statement of the Case

Evidence at Trial

This petition brings to mind Judge Friendly's observation in *United States v. Frattini*, 501 F.2d 1234, 1238 (2d Cir. 1974) that "this is the rare narcotics case

where the defendants may be innocent." (Friendly, J., concurring and dissenting). Indeed, the trial judge, in sentencing Cicale, stated that if he were the trier of fact, there would have been a "good possibility" that he would have found a reasonable doubt. (T 16)[1] Nevertheless, the court held that the jury's verdict was supportable by inferences which flowed from the statements and acts of another individual alleged to have been a co-conspirator. It is this finding that is the subject of Cicale's principal argument here. Since the sufficiency of the government's evidence is challenged, a detailed review of the facts of this case, unavoidably long and difficult, must be presented.

The most focused part of the investigation which led to this prosecution was the dealings between an undercover DEA Agent and John Messina, an individual who boasted of access to large amounts of high quality heroin.[2] The government's evidence of Messina's drug trafficking contained no element of mystery. In short, proof of Messina's guilt was overwhelming. The issues at this trial dealt not with Messina's involvement with herion but rather the source of Messina's supply. The government's contention was that Messina had a number of sources and that Cicale was one of them.

Eloy Garcia, a DEA Agent working undercover, was introduced to Messina on October 29, 1980, by an informant named Jack Hinkerton. (T 66) Conversation between Agent Garcia and Messina began with Messina asking the agent whether he was satisfied with the one ounce sample that the agent had received from Messina through Hinkerton. (T-67-68) Garcia said that he was satisfied and asked Messina about the price and availability of larger amounts. *(Id.)* After furnishing a price scale, Messina made the first of a number of "revelations" about his suppliers. Messina stated that although

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[1] The letter "T" refers to the trial transcript.

[2] As noted John Messina, as well as co-defendant Edward Martinez, plead guilty prior to trial.

his heroin would come from a single source "90% of the time", he had several other sources available. (T69) The agent then negotiated to obtain a delivery of one-eighth of a kilogram and future deliveries of one-half of a kilogram every ten days. (T 67-68)

Seemingly comfortable with the prospect of a long and prosperous business relationship with Garcia, Messina asked the agent to supply quantities of mannite to be used to dilute the narcotic. On one occasion prior to their first meeting, Garcia, again through Hinkerton, supplied some mannite from a DEA laboratory. At the October 29th meeting Garcia produced more mannite in a distinctive orange plastic bag. (T 63) This orange bag was an important part of the government's case against co-defendant Frank DeSimone. When Messina took the bag from Garcia he told the agent that he was going to meet his "friend" a few blocks away and that this friend would check the quality of the mannite. (T 70-71) The orange bag was next seen by surveillance agents in the hands of Frank DeSimone as he was walking on East 86th Street following a brief meeting with Messina and Hinkerton, shortly after they had left Agent Garcia. (T 663-65) These events, however, had nothing whatsoever to do with Cicale. In fact, the government's bill of particulars stated that Cicale was alleged to have entered the conspiracy on January 15, 1981, more than two months later.

The next significant event occurred on November 14, 1980, again before Cicale is alleged to have joined the conspiracy, when Messina sold an eighth of a kilogram of heroin to Garcia for $30,000.00. (T 70-76) The government actually stipulated that the narcotic which Messina sold to Garcia on November 14th was not supplied by any of the defendants in this case. (T334)[3]

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[3] Later in the trial the stipulation was refined to show that at least one of the suppliers of the drugs produced on November 14th were persons with whom Messina socialized, a Mr. DelVecchio and Mr. Compapiano. (T 431-32)

As the government's proof in this case unraveled, more and more details of Messina's private life were bared. This was so, at least in the first instance, because Agent Garcia was able to develop an active social relationship with Messina and his wife.[4] A little more than a month after the November 14th sale, Agent Garcia was invited to dinner at the Messina home. (T 94) Garcia and Mr. & Mrs. Messina were joined for dinner by a man identified as Vito Denicolo, a known narcotics dealer. (T 94-95, 341) Later in the evening, a visitor named Ray stopped by. An hour or so later an individual who was not introduced to Garcia, but whom the agent recognized as Joseph DelVecchio, also a known narcotics trafficker, came to the house. (T 95, 336-37)

Garcia's meetings with Messina, both before and after this initial dinner party, dealt, on a business level, primarily with negotiations for future deliveries of heroin. Garcia's strategy, in his effort to find Messina's source, was to insist upon an arrangement which would guarantee regular and uninterrupted delivery of substantial quantities of the drug. (T 92) Messina assured Garcia that his demands could be met and that there was no cause for concern since he had five different sources from which the heroin could be obtained. *(Id.)* These negotiations continued into January of 1981. As Garcia's friendship with Messina grew closer,[5] the agent insisted on meeting Messina's "most reliable source". (T 116)

On January 15th, the day Cicale is alleged to have joined the conspiracy, Garcia and Messina again met to discuss future deals. Garcia proposed to purchase a quarter kilogram of heroin for $25,000.00 more than the

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[4] As will be developed, the DEA was able to further penetrate Messina's affairs by the installation of a court authorized wire tap on March 4, 1981.

[5] On January 14, 1981, Agent Garcia and a female DEA Agent named Evie Clark had dinner at a Manhattan restaurant with Messina and his wife. Garcia introduced Agent Clark as his wife. (T 109-110)

agreed upon price. (T 116) The purose of the overpayment was to build up credit with Messina's source so that an ongoing relationship would be established. (T 116-17) In the event that the agent and "his people" were unable to make further purchases, the source would be entitled to keep the $25,000.00 overpayment. *(Id.)* Messina, who seemed to favor the proposal, said that he would take the idea to the source and then meet with the agent the next day. (T 117-18) According to Agent Garcia's courtroom testimony, Messina stated that he was going to talk to his source "right now". (T 118)[6]

After Garcia left Messina on January 15th, an extended surveillance began. Agents, including Garcia, watched as Messina went into a building located at 200 West 57th Street where Messina's sister owned a business. (T 119-20) The agents next spotted Messina some 45 minutes later in an automobile driving along Eighth Avenue with Cicale as a passenger. (T 1006) Messina and Cicale were followed to a clothing store, Wrangler Ranch, on upper Broadway. *(Id.)* After a half hour in Wrangler Ranch, Messina and Cicale came out laden with shopping bags. (T 688) From the Wrangler Ranch, Messina and Cicale drove to El Parador, a Mexican Restaurant on East 34th Street. (T 688-89) Some two hours later, Messina and Cicale left El Parador and drove a short distance to the Bloomsbury Rib House. (T 125, 689) Moments later, as Agent Garcia testified, Cicale came out of Bloomsbury, re-entered Messina's car and drove another short distance to 137 East 36th Street, which he entered carrying a white paper bag. (T 125-26) A few minutes later Cicale came out of the

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[6] Concededly, this court must review the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60 (1942). However, it is not inappropriate to note that the highly critical fact that Messina was to meet his source "right now" was not contained, in words or substance, in any DEA report, in the Assistant United States Attorney's notes nor, perhaps most significantly, in an affidavit in support of an application for the wiretap, an affidavit which gives a detailed recitation of Garcia's January 5th conversation with Messina.

apartment building with another individual who was then unidentified. (T 127) This other individual drove Messina's Cadillac, with Cicale as a passenger, back to the Bloomsbury Rib House. (T 127-28) Some 15 minutes later, Messina and Cicale came out with Messina carrying a white paper bag. Messina then drove away and Cicale walked west on 36th Street. *(Id.)*

The next day, January 16, 1981, Agent Garcia and Messina met, as arranged, on 79th Street and Second Avenue with Garcia expecting to meet the "source". (T 128-29) According to the plan, Garcia had $75,000.00 in government funds which represented payment for a quarter of a kilogram and the $25,000.00 "overage". Messina immediately showed the agent the heroin but reported that the source had decided not to come because the weather was bad. (T 130-31) The agent, quite upset, told Messina that this would cause a serious problem with his "people" in Chicago and that a single isolated purchase of heroin was not nearly as important as an arrangement for regular deliveries on a punctual basis. (T 131-32) The upshot of the meeting was that neither money nor heroin was exchanged. Messina said that he would talk to his "guy" and would again meet the agent at 9:00 o'clock that evening. (T 132) Surveillance agents then saw Messina's vehicle go to White Plains Road in the Bronx. (T 692-93)

The evening meeting on January 16th never took place. It was not until more than a month later, on February 18, 1981, that Garcia met Messina again. (T 133) After a brief meeting at the Grand Hyatt Hotel, Messina invited Garcia to his home for dinner, first stopping at Ballantine's barber shop in Manhattan so that the agent could get a haircut. (T 135) While having dinner that evening, Messina mentioned that a "friend" was coming over at about 10:00 p.m. and that he and the friend would have to take care of "business". (T 136-37) The friend turned out to be John Compapiano, a known narcotics dealer, who was introduced to Garcia as the agent was leaving the house. (T 137)

In early March of 1981, Agent Garcia and Messina began playing racquetball together at a court in Fort Lee, New Jersey. (T 144-45) After playing a game and taking a sauna, the conversation turned from sports to heroin. Garcia told Messina that his Chicago customer wanted to purchase a half kilogram every week. (T 146) Although Messina again said that this schedule would be no problem, Garcia wanted further assurances that the deliveries would be regular so that his "customer" would not be disappointed. (T 146-47) In response, Messina said that he would talk to "a couple of sources" to see if he could get a firm commitment for continuous business on a regular basis. *(Id.)* Supposedly, Messina was going to talk to his people the following day, March 4th, and contact the agent on the day after that, March 5th. (T 148)

March 4th was significant for yet another reason. It was that day that a court authorized wiretap was placed on John Messina's home telephone. *(Id.)* Although Cicale did speak to Messina on the telephone on March 4th, as he did on nearly a daily basis, there was nothing to indicate that the conversation was related to heroin. More significantly, surveillance agents saw Messina, during the evening of March 4, 1981 meet with Anthony Todisco, another known narcotics trafficker. (T 1007-8) Moreover, in a recorded conversation between Messina and Cicale on March 4th, Cicale asked Messina who he had played racquetball with the day before. Messina told Cicale that it was no one Cicale knew. In a case where the government was stretching for inferences, this clearly belies any notion that Cicale was familiar with Messina's current illicit affairs.

Because of bad weather there was no meeting on March 5th, but Agent Garcia and Messina again played racquetball on March 6th. Messina told Garcia that he was unable to contact a source because of the weather, but intended to do so that evening and would meet the agent the following day at Ballantine's Hairstylist. (T 168-71)

DEA Agent William Oakes was following Messina on the evening of March 6th when he saw, at about 9:20 p.m., his subject meet with John Beneducci and Vito Denicolo. (T 706) This surveillance was lost when Messina, with Beneducci and Denicolo in the car, drove off at a very high rate of speed. (T 706-07)

On March 7th, Messina met Garcia at Ballantine's. (T 171) There, he reported that he had spoken to one of his sources but that "the guy would not commit himself". *(Id.)* Messina promised, however, to speak to "another guy" that evening. *(Id.)* The government's case then focused on recorded telephone conversations between Messina and defendant Paul Spector on March 8th. On March 9th, Agent Garcia and Messina met again at a diner in Fort Lee. (T 177) Messina told Garcia that he had been in contact with his source but that the "guy was wavering" and was unsure about whether he would meet Messina's customer. (T 178) Messina also reported that he had met with yet another potential source but that individual too, would not commit himself to regular deliveries. (T 178-79)

In light of Messina's difficulties with his "sources", Agent Garcia changed his strategy. Garcia told Messina that he would be willing to deal on a supply and demand basis. Messina, whose discretion was obviously limited, said that he would make an inquiry as well as meet with "other people" and would then meet the agent at a restaurant near Ballantine's the following day. (T 179)

Although the government showed that Messina had contact with Cicale at this time (for example, on the telephone on March 8th (T 186)), there is nothing that connected Cicale to Messina's futile search. Again the government's focus was on conversations between Messina and Spector. (T 180) On March 10, 1981, Messina met, as planned, with Garcia and said that he had played racquetball that morning with one of his

sources.[7] This source, according to Messina, was reluctant to meet Garcia and to commit himself to regular deliveries. (T 188-89) However, Messina was able to supply a price list for single deliveries. *(Id.)* Before Messina and Garcia parted company on March 10th, Messina said that he would contact one other person in an attempt to resurrect the regular delivery arrangement. (T 195)[8]

On March 11th, Agent Garcia and Messina again met to play racquetball. (T 197) At a post-game lunch, the agent agreed on a price and asked Messina to find out when the heroin would be ready. (T 198) Following Garcia's testimony about March 11th, the government played three telephone conversations including one conversation between Messina and Cicale. (Exhibit K) This conversation was nothing but social.

On the evening of March 13th, Agent Garcia met Messina at the Plaza Diner and asked for an eighth of a kilogram of heroin, since his Chicago customer was coming to town. (T 200-201) Messina said that his personal supply of heroin was inaccessible but that he would "reach out" to someone else who lived close by. *(Id.)*[9] Messina instructed Garcia to get $30,000 for the heroin and then go to J.G. Melons, a Manhattan pub, where Messina would call him. (T 201-02) According to the plan, Messina would tell the agent on the phone

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[7] The business records of the King Arthur's Racquetball Court in Fort Lee showed that on the morning of March 10th Messina played racquetball with Spector. (T 1280)

[8] With this, the government played a recorded conversation between Messina and Cicale at 10:00 p.m. on the evening of March 10th. This brief conversation contains no reference, express or implied, to illicit activity. although played, neither the government nor the court attributed any significance to it.

[9] It was shown that Cicale lives at 2100 Linwood Avenue in Fort Lee, New Jersey, a short distance from the Plaza Diner. (T 206) It was also shown that DelVecchio lived near the diner. (T 407) A pen register placed on Messina's phone showed that in the last three months of 1980 some 63 calls were made from Messina to DelVecchio's phone. (T 843)

whether or not he was able to contact his nearby source and if not, he would tell Garcia that he would see him Monday.[10] At 9:30 that evening Messina called Melon's and told Garcia that "I'll have to see you Monday." (T 202)[11]

The government next played five telephone conversations recorded on Messina's phone the next day, March 14th. Three of these conversations were between Messina and Cicale, one was between Messina and DeSimone and another between Messina and Spector. During the first conversation, Cicale and Messina agreed to see each other later that day.[12] In the early afternoon, surveillance agents saw Messina drive to 2100 Linwood Avenue and then leave, several hours later, with Cicale driving over the George Washington Bridge toward Manhattan. (T 2101-02)[13] Later that

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[10] Garcia testified that Messina told him that his heroin was in a bank and thus could only be obtained during business hours. (T 201)

[11] This aborted sale is significant. A New York City detective, Carmel Vasta, watched Messina as he went to 2100 Linwood Avenue where he stayed for a half hour immediately before meeting with Garcia. (T 1446-47) Although 2100 Linwood Avenue is a large apartment building, and although Messina's sister lives in the same complex (although not at that address), the inference desired by the government was that Messina visited Cicale. If this were so, and if Cicale was actually a co-venturer with Messina, one may wonder why Messina was so tentative moments later when he met with Garcia.

[12] It is important to remember that Messina had already aborted the weekend sale and, according to Agent Garcia, would go to the bank on Monday to obtain the eighth of a kilogram from his own "stash."

[13] The agent did testify that surveillance was lost because Cicale drove over the bridge at a high rate of speed. Unlike the basic "high speed chase" with which this court is familiar, *United States v. D'Amato*, 493 F.2d 359, 362 (2d Cir. 1974), Cicale's drive over the bridge was not shown to be related, unless by the most bald speculation, to the transfer of money or drugs.

afternoon Cicale called Messina at home (A Exhibit 100M).[14] Agents saw Cicale stop briefly at Messina's house in the Bronx later that evening. (T 1014)

On Sunday, March 15, 1981, Cicale and Messina were again under surveillance. Agent Oakes testified that he saw Messina's car parked near Cicale's apartment building. (T 713) At 8:00 p.m., Messina came out of the building and drove to the nearby home of Joseph DelVecchio. (T 716) After spending half an hour in DelVecchio's house, Messina stopped at a public telephone where he made a call and then returned to 2100 Linwood Avenue. (T 717) At approximately 9:45 p.m., Messina and Cicale came out of the apartment building, entered Messina's car and drove to a restaurant in Manhattan. (T 717-18) Agent Oakes watched as Cicale came out of the restaurant and drove to 137 East 36th Street. (T 718) After Cicale left, Agent Nicholas Alleva entered the restaurant and saw Messina sitting at the bar with Paul Spector. (T 1288) At 11:20 p.m., Cicale left the building on East 37th Street and went back to the restaurant. (T 719, 1289) Agent Alleva watched as Cicale came into the restaurant and asked Messina if he had seen an unidentified person named Jimmy. (T 1289) Messina directed Cicale to the rear of the restaurant. A short time later Cicale returned to where Messina and Spector were seated. Finally, Cicale and Messina left, driving to Cicale's home. (T 719-20)

On March 16th, there was apparently no contact between Agent Garcia and Messina. It was, however,

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[14] In a memorandum submitted to the court the government argued that during this conversation Cicale "cryptically" said "he said to do him a favor. He would appreciate it." (Government memorandum October 26, 1981, p. 6.) Unquestionably, neither Cicale nor Messina spoke with the precision of a Rhodes Scholar. However, even guesswork does not suggest an inference that this statement was drug related.

shown that Cicale and Messina met personally and spoke on the telephone. (T 723)[15]

On March 17th, Messina met with Agent Garcia at the Fort Lee Racquetball court. Again, Garcia requested one-eighth of a kilogram of heroin since his "customer" from Chicago was coming that evening. (T 211) Messina gave his characteristic assurance that this would be no problem and that he would meet the agent at a restaurant on Seventh Avenue at 5:00 p.m. that afternoon. At 5:00 p.m., however, Messina appeared and told Garcia that there had been a problem and that he would call later that evening. (T 214-15) After leaving Garcia, Messina returned home and later was seen going to the Tre Amici Restaurant in Manhattan. (T 734) Agent Oakes saw Cicale arrive at Tre Amici also. (T 735) Once again, Agent Alleva was inside, where he was able to see Messina, Cicale and two other unidentified persons engaged in conversation. (T 1290) More than an hour later, Cicale and Messina came out of Tre Amici and drove a short distance together, followed by Agent Oakes and, in another vehicle, police officer Vasta. When Cicale's car stopped for a traffic light at 68th Street and Third Avenue, officer Vasta pulled alongside and looked into the car which, according to the officer, had its interior light on. (T 1452) For some 30 seconds officer Vasta watched as Messina looked into a brown paper bag. *(Id.)* Cicale and Messina then drove back to the restaurant. (T 1459) Five minutes later, Messina left the restaurant and drove to the Bronx, stopping at a public telephone along the way. (T 739) Agent Garcia testified that at about midnight he received a call from

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[15] Here again the government, in its October 26th Memorandum to the Court, sought to bolster its case by referring to a "cryptic" phrase in the Cicale-Messina telephone conversation. ("You really can get yourself together...Maybe my friend from Yonkers will come down..." (p.7).) This reference, however, is patently disingenuous since "you can really get yourself together" was part of the lyrics of a popular song that Messina was singing on the telephone. The reference to Messina's friend from Yonkers was made three transcript pages after the conclusion of this stanza.

Messina who told him that everything seemed all right and that he would meet the agent the following day, March 18, 1981, at the Plaza diner in Fort Lee. (T 215-16)

On March 18th Messina was being watched by Agent Dwight Rabb. At 10:00 a.m., Rabb saw Messina and his wife drive to a diner in Yonkers where they met Paul Spector. (T 1203-04) After the Messinas drove back to their Bronx apartment, John Messina left and drove to Cicale's residence in Fort Lee. (T 1204) About two hours later, Messina came out of the building with Cicale and entered Messina's car with Cicale driving. (T 1205) The agent then described Cicale taking a circuitous route at a high rate of speed, "looking back" at the agent's vehicle. (T 1205-12)[16] Agent Rabb next saw Messina (but not Cicale) meet Agent Garcia at the Plaza diner. (T 1211-12) At the diner, Messina told Agent Garcia that his "people" were followed the previous day and so they couldn't go to their "stash" to get the heroin. (T 216) After more discussion about heroin and a plan to obtain larger amounts, Messina said that he would contact the agent again. (T 219-20) Later that afternoon Messina and Cicale were seen together. (T 1112-13)

On March 19th, the agent and Messina met at the Plaza diner. (T 222) Messina again told Garcia that his people were going to stay away from the "stash" until things "cooled off". (T 223) Garcia suggested that Messina contact another source and Messina agreed, stating that he would go talk to one of his sources as soon as he left the agent. (T 223) Messina told Garcia to get his money and meet him at Tom Swift's Restaurant, a few blocks from the diner. (T 225)

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[16] Again, the evidence on appeal must be looked at in the light most favorable to the government. *Glasser*, however, does not prevent this court from looking at the testimony of a law student-investigator, called by the defense, who traced the route described by Agent Rabb and found that it was physically impossible - the streets described did not connect. (T 1820-39)

When Messina left the Plaza Diner, he was followed by police officer Vasta to Cicale's apartment building. (T 1455)[17] At 9:30 p.m. Messina drove to Tom Swift's restaurant where he met Garcia. Messina told Garcia that he had gone to his source's house and the "guy wasn't there". After "calling all over the place" Messina said that he had finally reached his source but that they would have to go to New York City. (T 288-29) Messina said that he would leave Garcia at a restaurant on Third Avenue, Bechet's, and return in an hour with the heroin. (T 229) While Agent Garcia was at Bechet's, officer Vasta followed Messina as he made brief stops at several east side restaurants before returning to Bechet's. (T 1456) Officer Vasta also saw Messina make a telephone call from a public booth. A second conversation on government exhibit 100AA shows that Messina called his wife at 10:33 p.m. and told her that he was "looking for Peter like crazy." Finally, Messina returned to Bechet's and said that although he located the "guy", he didn't want to leave the company of some out-of-town relatives with whom he was having dinner. (T 232-33)[18]

On March 20th, the ever patient agent met with Messina again to play racquetball. (T 233) And again, Messina told Garcia that he was waiting for a call from his source. (T 234) From the racquetball court the agent and Messina went to Messina's home, still waiting for the source to call. (T 235) Messina and Garcia then drove to Manhattan in separate cars, eventually meeting at Ballantine's barber shop after Messina took a detour to an unspecified place to wait for his source's call. (T 236) At Ballantine's, Messina reported that

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[17] A recorded conversation from Messina to his wife confirmed the fact that Messina went to Cicale's apartment. (I'm over at Petey's house for a minute.") (Government's Exhibit 100AA)

[18] The record shows that Cicale's brother-in-law, Emiel Petrone, a California record company executive, was in New York from March 17th to March 22nd. He swore, however, that he had dinner with Cicale on only one evening, March 20th and not on March 19th. (T 1647-52)

that there would be yet another delay until that evening. (T 237) Messina and agent Garcia then returned to Messina's house to wait for the phone call. *(Id.)* After returning home with the agent, Messina briefly left the house to make a call to his source from a public phone. (T 238) In order to have a "backup" source, Messina left to make a call a second time. (T 239) When Messina returned he said that one source had agreed to meet him the following day and a second source was not in. (T 242) Finally, Mr. and Mrs. Messina and Agent Garcia went to a nearby restaurant for dinner. (T 643) The government's proof regarding the events of March 20th was supplemented by two recorded telephone conversations between co-defendant DeSimone, and Mrs. Messina concerning John Messina's whereabouts. (T 234, 240-41)

On March 21st, as the government showed, Messina called both Paul Spector and Cicale. (T 244-45) There is absolutely nothing in the transcript of the Cicale call to suggest that it was drug related. (100EE) In the evening of March 21st, DEA Agent Michael Gray saw Messina drive to the "vicinity" of Joseph DelVecchio's house. (T 1356) He later saw Messina make a brief stop at Cicale's apartment house. *(Id.)* Later that evening Messina called Agent Garcia and said that he would call again the following day. (T 245)

On Sunday, March 22nd Messina called Garcia at 9:30 p.m. and arranged a meeting for the following day at 1:00 p.m. (T 246) Ten minutes after this call was made, surveillance agents saw Messina traveling on the FDR Drive where he exited in East Harlem and met Cicale on First Avenue and 117th Street.[19]

On March 23rd, heroin was finally delivered. It is this delivery which forms the basis of the single substantive count on which Cicale was convicted. At 1:00

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[19] During an earlier recorded conversation (Exhibit 100FF) Cicale and Messina agreed to meet at Cicale's mother-in-law's home. It was stipulated that Cicale's mother-in-law lives at 400 East 117th Street in Manhattan. (A 750)

p.m., on the 23rd, Messina went to the Plaza Diner and told Garcia that everything was ready and that the heroin was together. (T 247) First, however, Messina would have to go ("right now") to the source of supply to make sure that everything was in order. (T 247) Messina then promised to call the agent at 5:00 o'clock; if everything was all right he would tell the agent on the phone to meet him for a drink. It would be understood that this would mean a meeting at Tom Swift's. (T 248) Agents surveilling the diner saw Messina leave at about 1:40 and drive to Cicale's apartment building. (T 1123, 1359) The agents noted that Cicale's car was not in its designated parking space *(Id.)* and then saw Messina leave the building and drive to a location in the Bronx. (T 1359-60)

Messina was kept under surveillance for most of the day on March 23rd.[20] After spending several hours in his house, Messina and an unidentified male (not one of the defendants) left the house and had a street corner conversation before parting company. (T 1125) Shortly thereafter, Messina went back to his house where he stayed until 9:00 p.m. (T 1126) As the agent watched, Messina drove to the vicinity of 116th Street and First Avenue where he made a telephone call from a public booth. (T 1361) Agent Garcia testified that he received a telephone call from Messina at 9:30 p.m. and was told, as was pre-arranged, to meet him for a drink. (T 249) Although the agents periodically lost sight of Messina, they then saw him drive to Tom Swift's restaurant in Fort Lee. (T 1361-62) At Tom Swift's, Messina told Agent Garcia that everything was ready and that the heroin would be delivered at Bechet's restaurant in Manhattan. (T 250) Messina directed Garcia to wait five or ten minutes before driving to Manhattan. *(Id.)* The agents kept sight of Messina as he drove alone to 79th Street and Third Avenue where he abruptly stopped his car and ran south, out of the agents' view. (T 754-55) A

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[20] March 23rd was the last day of the court authorized wiretap. (T 246)

few moments later, Agent Garcia arrived at Bechet's where he found Messina. (T 252) In the bathroom an eighth of a kilogram of heroin was exchanged for $30,000 in government funds. (T 252) After the sale, the agents watched as Messina made brief stops at the Tre Amici restaurant, a First Avenue pizza parlor and a Bronx McDonald's. (T 758-59)

Two days later, on March 25th, Agent Garcia met with Messina at the racquetball court and then had lunch at a nearby restaurant. (T 258-59) Messina told the agent that if he were satisfied with the one-eighth kilogram, the same source would provide the three and a half kilograms that had been earlier discussed. (T 259-60) When Garcia asked about the particulars, Messina said:

> Look, as soon as I finish eating I'm going to go over to the guy's house and we are going to discuss that, and as soon as we come up with some sort of arrangement, I'll let you know. Why don't I get together with you the following day and run it down to you, or advise me of the situation.

(T 260) According to Messina, the "guy" he was going to see was the same "guy" that provided the one-eighth of a kilogram two days earlier. *(Id.)* Officer Vasta followed Messina as he left the meeting with Garcia and went directly to 2100 Linwood Avenue. (T 1157) Fifteen minutes later, Messina and Cicale came out of the apartment building and drove out of the area. (T 1458)

After March 25th, and into early April, Agent Garcia had several conversations with Messina. Now discussing a delivery of three and a half kilograms, Messina said that he met with his source and delivery could be expected on Sunday, March 29th. (T 274) The March 29th delivery never came about, but Messina and Agent Garcia continued to play racquetball and continued to negotiate. On the evening of March 30th, Messina and Agent Garcia went to Manhattan, traveling to a number of restaurants looking for the "source". (T 280-82) The source, however, was not to be found.

During this time, Agent Garcia was in daily contact with Messina. On April 3rd, at Ballantine's barber shop, Messina proposed a method of exchanging the heroin for the agent's cash. (T 285) On April 5th, Agent Garcia told Messina that he was not satisfied with the arrangements Messina had made for delivery and offered a new plan which Messina said he would take to his people. (T 296)

On April 7, 1981, Agent Garcia met with Messina at the Plaza diner in Fort Lee. Messina told Garcia that he had been distracted by the death of a close friend, but that he would go "right now" to see his primary source to see whether he would agree to Garcia's plan. (T 298) Again, Messina told Agent Garcia that his source lived "a couple of blocks" away. *(Id.)* Police officer Joseph Delagera testified that at 2:15 Messina arrived at 2100 Linwood Avenue and that an hour later he saw Messina leave and drive away with Cicale. (T 1408-09) It was also established, however, that later in the afternoon of April 7th, Messina was observed having a clandestine conversation with an individual in a car registered to DelVecchio. (T 1411-12)

The testimony regarding April 8th was the government's last piece of evidence against Cicale. On April 8th, at a Bagel Nosh restaurant in Fort Lee,[21] Messina told Agent Garcia that his people didn't like the proposed plan. (T 301) The agent, however, remained firm and suggested that Messina go back to his people and try to convince them to see his "point of view". (T 302) After further discussion about the deal, Messina told Garcia that:

> He was going to pick up his guy that was waiting for him at the restaurant a couple of blocks down the street, he told me.

(T 303) As this meeting ended, officer Vasta followed

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[21] The transcript of page 301 erroneously states that this meeting was on April 9th.

Messina to the J.D. Steak Pit restaurant where he met with Cicale. (T 1458-59) Despite this immediate meeting, however, Messina did not call Agent Garcia, as he had promised, within an hour. (T 304) At 6:00 p.m., Messina finally called and arranged to meet the agent the next day. *(Id.)* After further negotiations at a meeting on April 9th, Garcia and Messina agreed to finalize the deal on the following day, April 10th. (T 305-10) Surveillance agents established that on April 9th, Cicale was seen in the company of co-defendants DeSimone and Spector. (T 1364) On April 10th the defendants were arrested.

The District Court's Opinion

Following both the close of the government's case-in-chief and the end of trial, Cicale argued that the evidence, viewed in the light most favorable to the government, was insufficient to sustain a conviction. In a post-verdict opinion and order, the District Court found that the government had satisfied its burden under *United Staes v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied* 397 U.S. 1028 (1970), establishing by a fair preponderance of the evidence, independent of what otherwise would be hearsay, that Cicale was a member of the charged conspiracy and was thus accountable for statements made by Messina. The court then held that these statements were necessary and sufficient to sustain Cicale's conviction.[22] Based upon its interpretation of *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973) and *United States v. D'Amato*, 493 F.2d 359 (2d Cir. 1974), the court concluded that the six occasions on which Messina told Agent Garcia that he was going to see his source did not involve hearsay statements, but rather non-hearsay verbal acts which

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[22] Hereinafter, the term *"Geaney"* will be used in reference to a trial court's obligation to make a preliminary finding of sufficient independent non-hearsay evidence of a defendant's participation in a conspiracy before admitting coconspirator statements under Fed.R. Evid. 801(d)(2)(E).

could be consideded by the court as independent proof of Cicale's participation in the conspiracy.[23]

The Court of Appeals Opinions

On an appeal, Cicale challenged this finding of sufficiency, claiming that the District Court erroneously relied upon the "verbal acts" doctrine and that, therefore, there had been no legitimate basis for the concededly necessary invocation of Fed. R. Evid. 801(d)(2)(E). In response, the Court of Appeals apparently

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[23] In a footnote to its opinion, the District Court provided a summary of what it found to be the "verbal acts".

The following chart indicates (1) the date of the conversation between Messina and Garcia and of the subsequent meeting or attempted meeting between Messina and Cicale, (2) Garcia's testimony as to the statements made by Messina to Garcia and the relevant trial transcript pages of Garcia's testimony, and (3) the relevant trial transcript pages containing the testimony as to surveillance of Messina meeting or attempting to meet with Cicale:

(1)	(2)	(3)
January 15, 1981	"...he said he was going to talk to him right now..." (118).	683-691 1006-1007
March 19, 1981	" 'I'll go talk to one of my sources'...He said he was going to go there as soon as he left me" (223).	741-743 1453-1455
March 23, 1981	" 'I'm going to drop by the guy's house that is providing this heroin, the source of supply, right now...' " (247).	750-751 1122-1125 1359
March 25, 1981	"At that time, we entered conversations concerning as how the deal would go down or the delivery would be made, so he says, 'Look, as soon as I finish eating I'm going to go over to the guy's house' ..." (260).	1456-1458
April 7, 1981	" '...I will go ahead and see them, you know, the primary source right now...He just lives a couple of blocks from here...I will go talk to him right now because he lives a couple of blocks from here..." (298).	1408-1409
April 8, 1981	" '...I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at' " (302).	1458-1460

agreed with this view because it in no way suggested that the District Court had been correct in its characterization of Messina's statements as "verbal acts". Rather, the majority on the panel held that Messina's statements were admissible as an exception to the hearsay rule under Fed.R.Evid. 803(3), which sanctions the admission of hearsay statements reflecting a declarant's intentions or future plans to prove subsequent acts.

However, the majority also recognized that its finding raised the difficult issue of whether or not a declaration of intention is admissible not only against the declarant but also to prove the future conduct of a third party. Prior to the enactment of the Federal Rules of Evidence, the case of *Mutual Life Insurance Company v. Hillmon,* 145 U.S. 285 (1892) permitted statements of future intention to serve just this purpose. However, as the majority below recognized, "the legislative history of Rule 803(3) in the House indicates an intent to prevent use of a declarant's statements as to future intentions to prove the acts of a third person." (16a)

Therefore, seeking to avoid "join[ing] the debate about the merit and present vitality of *Mutual Life Insurance v. Hillmon*..." (6a), the majority engaged in a course of appellate fact finding that allowed it to find an alternative basis for the admission of Messina's statements. The court stated:

> Cicale's own behavior, moreover, - his numerous conversations and meetings with Messina,...his meetings with Messina at critical junctures of the conspiracy,"...His evasive driving on the nights of March 17th when he met Messina at the Tre Amici restaurant and on March 22nd after he and Messina met in East Harlem,...His encoded conversations warning Messina not to "misshoot" - also connect him to the conspiracy for *Geaney* purposes.

(18a)

In his dissent, Judge Ward criticized the majority for three reasons. First, he concluded that the district court's application of the "verbal acts" doctrine had been incorrect. Second, Judge Ward argued that, in light of Rule 803(3)'s legislative history, statements of future intention were only admissible against a declarant and could therefore not be used as "independent evidence" of Cicale's participation in the conspiracy. Finally, the dissent argued that *Geaney* findings are left exclusively to the trial judge and that an appellate court may not, after the fact, uphold the applicability of Fed. R. Evid. 801(d)(2)(E) on grounds other than those relied upon by the trial court.

Reasons For Granting the Writ

For the reasons stated by Judge Ward in his dissenting opinion, the majority in this case erred in affirming Cicale's conviction.

1. Messina's Statements Were Not "Verbal Acts".

First, there can be no doubt that Judge Connor adopted an erroneous view of the "verbal acts" doctrine. Indeed even the majority appears to be in agreement on this point, as it wholly ignored the District Court's reasons for admitting Messina's statements and upholding Cicale's conviction. As Judge Ward correctly noted: "A 'verbal act' is a statement which, *irrespective of its truth or falsity,* has legal significance, or which, *irrespective of its truth or falsity,* explains the legal significance of an otherwise ambiguous act." (25a) In other words, verbal acts are those statements which are not offered to prove the truth of the matter asserted, but merely to characterize and define non-verbal conduct." *See Anderson v. United States,* 417 U.S. 211 (1974). The *sin qua non,* then, of a verbal act is that the truth of the words spoken are immaterial.

In the present case, though, the truth of Messina's statements were of crucial importance. That is, the

statements had absolutely no significance unless Cicale was, in fact, Messina's source. Thus, Messina's statements were not "verbal acts" because this was a case "where words which clarify an ambiguous situation are relevant only because they are offered for their truth." 4 J. Weinstein and Berger, *Weinstein's Evidence*, Para. 801(c)[01], at 801-69 (1981). As Judge Ward stated:

> The government contends that the meetings between Messina and Cicale evidenced Cicale's participation in the conspiracy. However, given the long-standing friendship between Messina and Cicale, and also Messina's contacts with numerous other drug dealers in the New York area, the Messina-Cicale meetings are not significantly probative of Cicale's participating in the conspiracy unless viewed in conjunction with Messina's prior statements to the effect that "I am now going to meet my source." The key point is that Messina's prior statements only give additional probative value to the subsequent meetings to the extent Messina's prior statements were true. That is, Messina's prior statements could properly be characterized as verbal acts only if, upon viewing the Messina-Cicale meetings in conjunction with these statements, one were able to conclude that the probative value of the Messina-Cicale meetings with respect to Cicale's participation in the conspiracy does not vary depending on whether Messina's prior statements are thought to be true or false. Plainly, such a conclusion would be absurd; indeed, at oral argument the government declined to urge that the Court take this view. To my mind, however, any application of the "verbal act" doctrine to the six statements in question would have to predicated on this untenable conclusion.

(25a-26a)

2. Messina's Statements Were Not Admissible Under Fed. R. Evid. 803(3).

Simply stated, Messina's six statements were properly considered for the purposes of making a *Geaney* finding only if *Mutual Life Insurance Company v. Hillmon*, 145 U.S. 285, 295-300 (1982), retains its vitality. Under *Hillmon*, of course, a declarant's statement of intent is admissible to prove not only the future conduct of the declarant but also the future conduct of a third party. However, in the course of enacting Fed. R. Evid. 803(3), the House Judiciary Committee stated that "the Committee intends that [Rule 803(3)] be construed to limit the doctrine of ...*Hillmon*..., so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person". H.R.Rep. No. 650, 93 Cong., 1st Sess. (1973), *reprinted in* [1974], U.S. Code Cong. & Ad. News 7075, 7087. Accordingly, as pointed out by Judge Ward: "Under Rule 803(3), then, while Messina's six statements to Garcia were arguably admissible, with a limiting instruction, against Messina..., they remained inadmissible hearsay as to Cicale." (28a) For this reason, then, it is clear that there was no legitimate basis upon which Judge Connor could take Messina's statements into account for the purposes of making his *Geaney* determination.

3. The Court of Appeals Erred In Relying Upon, Sua Sponte, A Separate And Completely Different Ground For Making a Geaney Finding.

In his dissent, Judge Ward states: "In affirming Cicale's conviction, the majority is determined to (1) disregard the six statements erroneously relied upon by Judge Connor, (2) look instead at the "real" evidence against Cicale, and (3) conclude that this evidence satisfied the *Geaney* standard." (28a) It is respectfully submitted that Judge Ward was correct in rejecting this approach.

This court has made it very clear that *Geaney* determinations must be based upon findings of fact made by the trial judge. *United States v. Nixon*, 418 U.S. 683, 701 n. 14 (1974). In this case, the trial judge clearly reached the conclusion that co-conspirators' statements could be used against Cicale only because Messina's six statements could be viewed as independent non-hearsay evidence of Cicale's involvement in the conspiracy. However, this view of those statements was incorrect. For this reason, the district court's *Geaney* determination cannot stand. It is simply improper and unprecedented for a Court of Appeals to embark upon a search for other evidence that will support a *Geaney* determination. Judge Connor, as a finder of fact, made a determination that only Messina's statements would suffice for the purposes of *Geaney*. That determination should not be altered by an improvident exercise of appellate fact-finding. As Judge Ward stated:

> [T]he fact that Judge Connor thought it necessary to invoke the "verbal act" doctrine in order to find that the *Geaney* standard had been satisfied as to Cicale strongly indicates that he found the "real" independent evidence insufficient to support such a finding with respect to Cicale. "Able jurists like Judge [Connor] do not seek out complexities for nothing. We must go on the premise that the [other] evidence failed to supply him with assurance sufficient to justify [finding that *Geaney* had been satisfied as to Cicale.]"

(28a-29a, *quoting United States v. Kaplan*, 510 F.2d 606, 613 (2d Cir. 1974).

Thus, it is clear that there was insufficient evidence to sustain Cicale's conviction. Judge Connor upheld the jury's verdict, believing that Messina's six statements formed the only legitimate basis for a *Geaney* finding. Absent this finding, which paved the way for the use of Fed.R.Evid. 801(d)(2)(E), it is clear that Judge Connor thought the case against Cicale to be plainly insufficient. Accordingly, this latter view should now prevail.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1071, 1078, 1235—August Term, 1981
(Argued June 1, 1982 — Decided October 7, 1982)
Docket Nos. 82-1018, 82-1020, 82,1022

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER CICALE, FRANK DESIMONE, PAUL SPECTOR,
Defendants-Appellants.

Before: KAUFMAN and WINTER, *Circuit Judges,*
and WARD, *District Judge.**

Appeal from a final judgment of the United States District Court for the Southern District of New York (Conner, *Judge*), after a jury trial, convicting appellants Cicale, Spector and DeSimone of conspiracy in violation of 21 U.S.C. § 846 and appellant Cicale of a substantive offense in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2, and raising as grounds for reversal claims regarding the admission of certain hearsay evidence under Fed. R. Evid. 801(d)(2)(E), sufficiency of the evidence and particular individual claims as well.

Affirmed.

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*Honorable Robert J. Ward, United States District Judge, for the Southern District of New York, sitting by designation.

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New York, New York, of counsel)
for Appellee.

WINTER, *Circuit Judge:*

Paul Spector, Frank DeSimone, and Peter Cicale appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, after a 13-day jury trial before Judge William C. Conner. Cicale, Spector and DeSimone were found guilty of conspiracy to distribute heroin and to possess it with the intent to distribute in violation of 21 U.S.C. § 846 (1976). In addition, Cicale was convicted of a separate count of heroin distribution and possession with intent to distribute based on acts taking place on March 23, 1981, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) (1976) and 18 U.S.C. § 2 (1976). Appellants assert essentially four grounds of error. First each contends that hearsay evidence was improperly admitted against them

under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Second, each claims that the evidence was insufficient to prove his guilt beyond a reasonable doubt. Third, Cicale contends that he was improperly denied the right to counsel of his own choosing by the trial court's refusal to grant a continuance. Fourth, DeSimone asserts that Judge Conner improperly commented upon his failure to testify.

We affirm.

BACKGROUND

Because the factual context is important to our decision, we set it forth in some detail.

On October 29, 1980, DEA Agent Eloy Garcia was introduced to John Messina on a Manhattan street corner. The two discussed Garcia's desire to secure regular supplies of heroin for a "customer" in Chicago. Through a DEA informant, Messina had already given Garcia a sample of heroin in exchange for mannite, a substance used to dilute heroin, and, at this October meeting, Garcia supplied Messina with a second token of good faith, an orange plastic bag containing a pound of quinine, another dilutant. In turn, Messina assured Garcia he could sell him a half kilogram of heroin every 10 days and quoted a series of prices for the drug. After complaining about the quality of the mannite, Messina announced that he wanted his "man," who was "waiting for [him] down the street," to test the quinine. Messina then drove seven blocks to the corner of York Avenue and 79th Street where DeSimone, his brother-in-law, was waiting. DeSimone got into the car, which Messina drove back up York Avenue to 86th Street. DeSimone got out of the car and carried the orange bag into a grocery store. He returned a few minutes later holding a brown paper bag of about the same size. He then travelled downtown to an office building on 47th Street by a combination of bus and foot.

On November 14, 1980, Garcia again met with Messina. This time Messina sold Garcia an eighth of a kilogram of heroin for $30,000.[1] After the sale was completed, Messina indicated his eagerness to continue doing business with Garcia. Messina asked Garcia when he would be ready to purchase more heroin and whether he would be willing to "double"—to buy twice the amount of a half kilogram—the next time. On December 11, 1980, the pair met again. They discussed the possibility of further purchases and Messina asked Garcia to supply him with another two pounds of quinine, explaining that he had all the heroin he needed but did not have enough dilutants to prepare the drug for distribution. On December 16, Garcia called Messina and the two met for lunch. Garcia gave Messina the quinine but explained that he was unable to purchase more heroin until he was certain that he would receive regular deliveries. Messina told him not to worry and bragged of having "five different sources of supply." The two then went to Messina's home in the Bronx for dinner where Messina showed Garcia a kilogram of heroin and offered to let him have it on a promise of later payment. Garcia refused, indicating that he was not in the market for isolated purchases.

Garcia and Messina met again for lunch in Manhattan on January 15, 1981. Garcia suggested that he give Messina's most reliable source $75,000 for heroin worth $50,000. The source could either keep the remaining $25,000 if Garcia were unable to order a further delivery of heroin within the week, or apply the money to subsequent drug purchases. Messina said he would "go talk with the guy," a source he was going to meet right away. Within the hour, Messina and Peter Cicale were observed together in Messina's Cadillac. The two spent the entire afternoon together; indeed, Messina met with no one else during the four and one-half hours he spent with Cicale.

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[1]The government stipulated at trial that none of the appellants were the source of this particular package of heroin.

However, late in the afternoon, Cicale left Messina alone inside Bloomsbury's Restaurant, took Messina's car and drove to a nearby apartment building where he met with and unidentified man. He then returned to the restaurant and spoke briefly with Messina.

The next day, January 16, 1981, Garcia met Messina to carry out the deal. Garcia had $75,000 with him and Messina, for his part, was carrying a quarter kilogram of heroin. However, Garcia refused to continue when he saw that Messina's source had not accompanied him; Messina attempted to make excuses but Garcia remained firm, insisting he was interested only in a permanent relationship and not in spot purchases.

In early March, Garcia and Messina began to see each other frequently, embarking on an odyssey which took them regularly to a racquetball court in Fort Lee, New Jersey, and numerous restaurants, coffee shops, and bars throughout the New York area. On March 3, after a game of racquetball, Garcia pressed Messina for a commitment to supply the "Chicago customer" with a half kilogram of heroin each week. Messina promised to talk to "a couple of sources the next day" to determine if he could arrange to do that type of continuous business. On March 4, the next day, Messina met with Anthony Todisco, a convicted narcotics dealer. Also on that day, a wiretap of Messina's home telephone revealed that he spoke to Cicale and arranged a meeting for the next day, which snow prevented. According to another intercepted conversation, Messina also had planned to meet appellant Paul Spector on the fourth but for unexplained reasons that meeting fell through as well.

On March 6, Garcia and Messina played racquetball again. Garcia tried to hurry things along by stating that his Chicago customer would be stopping in New York to meet him on his way home from Miami. Messina said he had not yet spoken to his source but that he had plans for a meeting that night. He also gave Garcia detailed

instructions concerning the use of the telephone, explaining that he was anxious about wiretaps. That night Messina met with John Beneducci and Vito Demicolo, two more known narcotics dealers.

On March 7, Garcia and Messina met at a barbershop and then went to lunch. Messina reported difficulties securing the kind of commitment Garcia was demanding but promised to speak to another source that same evening. In the late afternoon, he called Paul Spector and arranged to see him on the eighth. Messina then went to a family birthday party at LeChantilly Restaurant in Manhattan at which DeSimone was present.

The next day, Garcia called Messina to report that he would be meeting with his Chicago contact that afternoon. Shortly afterward, Messina received a cryptic call from Spector postponing their meeting in order to pick up "this thing"—"thing" being underworld jargon for heroin.

On March 9, Spector called Messina in the morning and they met at a Yonkers restaurant. An undercover agent at the next table overheard Spector complaining, "I don't want to do it that way. I would rather not do it that way. I don't want to. I would rather not." Messina replied, "Whatever you want to do." A few hours later Messina met Garcia in a Fort Lee diner and Messina reported that he had "spoken to a guy that morning, but the guy was wavering," and "wasn't sold on the idea of having to meet anyone else." Garcia then stated that he recognized he would have to do business with Messina on an *ad hoc* basis and asked Messina to get him a price list. Messina agreed. That night, Messina visited DeSimone and also telephoned Spector to arrange a meeting for the morning of the tenth.

On March 10, Spector and Messina played racquetball in the morning and Messina then met Garcia at a Manhattan restaurant. Messina said he had played

racquetball with one of his sources that morning but the source was unwilling to meet Garcia. Messina reported, however, that he had been able to get a price list which he furnished to Garcia. Messina then remarked that he had another source he could contact. At 10:00 p.m., Messina called Cicale and arranged to meet him the next day.

On March 11, Messina and Garcia again met to play racquetball and have lunch. This time they set up firm arrangements for a sale. Messina was to supply Garcia with three and a half kilograms of heroin at a price of $770,000. On Friday, March 13, Spector visited Messina at his apartment and, while he was there, Garcia called to arrange an immediate meeting with Messina at the Plaza Diner in Fort Lee. Messina set the meeting with Garcia for 7:00 p.m. and then called Cicale to warn him that he would call again that evening between 6:30 and 7:00 p.m. At 6:30 p.m., Messina left home, drove to Cicale's apartment building, which was near the diner, and went into the lobby. After departing, he drove to the Plaza Diner where Garcia was waiting. Garcia requested an eighth of a kilogram of heroin for his Chicago customer who was coming into town. Messina said his personal supply was inaccessible until Monday but he could try one of his sources who lived nearby, and, if unsuccessful, he would call Garcia with a coded message to meet him on Monday. Messina then left for an apparently fruitless drive around the northern New Jersey suburbs, first to DeSimone's house in Palisades Park, then to the home of another narcotics dealer in Englewood Cliffs, and finally to Cicale's apartment in Fort Lee. He called Garcia to say he would see him on Monday.

Over the weekend, Messina met or spoke with each of the appellants. On Saturday, Messina spoke to Cicale three times. After the first call, Messina drove to Fort Lee, picked up Cicale and they then drove into New York City together. Later that afternoon, Cicale called Messina and urged, "Don't mis-shoot whatever you do..." Then, around dinnertime, Spector called Messina and

stated, "that thing is not, is a little bit of a problem." Messina cut him off, saying, "Why don't you just see me. All right?" and the two agreed to meet the next day. Immediately afterward, Messina telephoned DeSimone and arranged a tentative meeting for the next day. A short while later, Messina telephoned Cicale. Cicale agreed to come to Messina's home and, a half-hour later, he arrived for a ten minute visit.

On Sunday, Messina called Spector at 1:00 p.m. and the two set up an evening meeting. Messina then visited DeSimone and Cicale, leaving Cicale's apartment building at 8:00 p.m. to drive to the nearby home of another known drug dealer. Messina spent half an hour there and then returned to Cicale's house. The two then drove to the Tre Amici Restaurant in Manhattan. Cicale left Messina inside the restaurant while he drove to 137 East 36 Street—the address Cicale had visited on January 15 prior to the aborted January 16 sale of heroin to Garcia. Messina, meanwhile, was observed sitting with Spector in the restaurant. Cicale returned, inquired as to the whereabout of a "Jimmy," and was directed to Messina's table. He joined Messina and Spector for ten minutes. The meeting broke up with Messina telling Spector to telephone him the next morning.

On Monday morning, March 16, Messina met with DeSimone. Early in the afternoon, Messina drove to Cicale's apartment building to look for him, and failing that, went to look for DeSimone. He then returned to Cicale's building and met Cicale in the lobby. The two held a brief conversation. Several hours later, Cicale telephoned Messina who told him, "Took a ride. Made a stop out there...And now I'm back to let you know that I could really shake 'em down." Cicale, in turn, remarked, "You remember Saturday night?...Remember I talked to you about...Is that still there?" At about 9 p.m., Messina went to a public phone and placed a call. After returning to his home, he then spoke to Spector and arranged to meet the next morning. A little later, Cicale called to

in ·ire whether Messina's "friend ever came over." When Messina replied negatively, Cicale asked to be informed if the friend should stop by.

On Tuesday morning, March 17, Spector and Messina met in Yonkers as arranged. Afterwards, Spector drove toward White Plains trailed by an entourage of DEA surveillance officers. Spector visited several banks; the next day he told Messina he had been followed by police officers in a blue car.

Meanwhile, Messina met Garcia at the Fort Lee racquetball courts. This time, Garcia asked for a half kilogram of heroin for his Chicago customer who was coming into town that same evening. Messina indicated that there would be no problem.

Shortly thereafter, Messina called Cicale, remarking that he had looked for him at home but had not seen his car. The pair agreed to a dinner meeting. Meanwhile, at 5 p.m., Messina met Garcia, explained there was a hitch delaying the deal, and announced that he would have "to check it out." Messina returned home, spoke with DeSimone to set up a tentative meeting and then drove back to Manhattan to meet Cicale as agreed at the Tre Amici. After spending an hour and a half or so in the restaurant, they left and drove in a ten block square without making any stops save for traffic lights and then returned to the Tre Amici. During the drive, surveillance agents observed Messina peering into a brown paper bag. After briefly going inside the restaurant, Messina and Cicale split up. Messina drove home and, at 10:30 p.m., called Spector and arranged a meeting for the next day. At midnight, Messina called Garcia to tell him that "everything seemed all right," but that they should meet anyway to discuss the matter.

The next day, March 18, Messina, along with his wife, met Spector at their usual Yonkers diner. After the meeting, Messina drove his wife home and continued on to Fort Lee where he met Cicale at the latter's apartment

building. Cicale and Messina left a few hours later, got into Cicale's car and drove around in an evasive manner. Shortly after 3:00 p.m., Messina met Garcia at the Plaza Diner, their usual rendezvous, and Messina reported that his "people" had been followed by a blue police car the day before and had been unable to go to the "stash pad" to pick up the half kilogram of heroin; however, Messina assured the agent that he himself had taken appropriate evasive action before their present meeting. They then discussed Garcia's proposed purchase of three and one half kilograms of heroin and started planning for delivery and payment. Soon after the meeting, Messina met with Cicale in Cicale's car and the two drove back to Cicale's apartment. Messina went inside and came back outside with DeSimone, got into DeSimone's car, and spoke for a while. In the evening, Messina talked with Spector and again with Cicale.

The next day, March 19, Messina told Garcia that he was still having trouble securing the heroin; he maintained that the trouble arose because, "my people have been followed, they have heat," and, therefore, weren't going near the stash pad. Messina said that he would try an alternate source for the heroin and suggested that Garcia get the money while he met with his source. Messina drove Garcia to a different Fort Lee restaurant, Tom Swift's, which he designated as their new meeting place. As they parted, Messina said to Garcia, "I'm going to talk to the guy right now, I'm going to his house, he lives down the street here." Messina then drove directly to Peter Cicale's apartment building without making any intervening stops and arrived about five minutes after he left Garcia. Messina then telephoned his wife and said he was "over at Petie's."

Cicale, however, was not at home. Messina quickly returned to Tom Swift's and explained to Garcia that he had gone to his source's house, but the source was not at home. Messina said he had made several telephone calls and had finally located the source in New York City.

Messina and Garcia then drove into Manhattan and Messina deposited the agent at Bechets, an eastside restaurant, and told him to wait. Messina then drove to three restaurants he had visited previously with Cicale—Tre Amici, El Parador, and Bloomsbury's—and, failing to find him, called home and told his wife, "I'm out looking for Peter like crazy. I can't find him anywhere." Messina rejoined Garcia at Bechet's shortly before midnight and explained that he had found his source but that the man was reluctant to do business because he was entertaining out of town relatives. Cicale's brother-in-law was visiting the New York area at the time.

On March 20, Messina visited Cicale's building and played racquetball with Garcia afterwards. Messina told Garcia he was expecting a call from his source that afternoon and invited Garcia to wait for the call with him. While Garcia and Messina were having their conversation at the racquetball courts, DeSimone called Messina's house and spoke to Mrs. Messina, remarking that he was "working on a few deals." Mrs. Messina, obviously wary of telephone surveillance, cut him off with a half-joking comment that she was "going to go into business" herself, doing sculptured fingernails.

After waiting some time at the Messina home, Messina, Garcia and Messina's daughter left the Bronx and drove to Manhattan. While Garcia took Messina's daughter to a hair-stylist, Messina went to a westside barbershop patronized by Cicale and also frequently telephoned by him. Messina waited there for about 20 minutes and then returned to the hair-stylist where Garcia had remained. Messina explained that the deal had been delayed and proposed that they go back to his home and wait for the call there.

After they reached Messina's home, Messina walked to a nearby candy store to call the source from a pay phone booth. At 7:00 p.m., when no call had yet come through from his source, Messina left the house to look

for a "backup." At the same time, DeSimone drove into the area and cruised around as if looking for someone. DeSimone went to a pay phone three blocks from Messina's house and called Messina's home. As DeSimone spoke to Mrs. Messina, Messina interrupted by walking up to the phone booth and the two held a brief conversation. Messina then went home and told Garcia that one source was out but that a second had agreed to meet Messina the next day. However, while Garcia and Messina ate at a nearby restaurant, Messina received a call. He then told Garcia there would be yet another delay.

On the following day, Messina stopped briefly at DeSimone's house and that of another contact before meeting Spector in Yonkers. Returning home, Messina called Cicale and then went to his apartment building. The next morning, Messina went back to New Jersey and called Garcia telling him, in effect, to stand by. He then met for about 40 minutes with the contact from the previous day. That night, Messina called Cicale who told him, "I'm in a serious mood...I want to get this straight." A few minutes later Messina called Garcia and told him to meet him the next day, March 23. Messina then drove to 116th Street and First Avenue in Harlem and made a telephone call. After that, Messina met Cicale at 400 East 117th Street, the home of Cicale's mother-in-law, and the two men drove off together in Cicale's car. At mid-day, March 23, Messina visited Cicale's apartment building for 15 minutes and then met with Garcia. Messina told Garcia the deal was on and Garcia allowed that he would now complete his own arrangements for the purchase. Messina replied with words to the effect that he was going to see his source "right now to make sure everything is squared away." Messina went directly to Cicale's apartment building and spent 15 minutes inside. At 9:00 p.m., he went to the same Harlem neighborhood he had visited the night before. He called Garcia and at 10:20 p.m. the two met in a prearranged Fort Lee restaurant.

They then went to Bechet's in Manhattan. In the restaurant bathroom, Messina handed over about one-eighth kilogram of 100 percent pure heroin in exchange for $30,000 in cash.

On March 25, Messina and Garcia played racquetball and ate lunch together. Messina said that the same "guy" who had supplied the heroin on March 23 would also supply the three and one-half kilograms of heroin Garcia wanted, and that he, Messina, would speak with his supplier right after lunch. Messina then went directly to see Cicale.

Over the next few days Messina continued to meet with the ever-patient Garcia to report his continuing, but apparently unsuccessful, efforts to arrange the three and one-half kilogram sale. Between March 27 and April 2, the two met at least three times and visited at least six different restaurants as well as the racquetball courts in their pursuit of the three and one-half kilos. On April 2, however, Messina was finally able to report that it looked "pretty good" and, the next day, he came forward with a complicated plan for the sale which, he asserted, was dictated by his "source." The plan required Garcia to give the $770,000 to Messina who would pass it on to a "mobile man" or intermediary to hold until the transaction was complete. When Garcia balked at the idea of a middleman, Messina reassured him saying, "This man is a relative of mine, he is like my brother."

Two days later, in a Fort Lee restaurant, Garcia suggested a counter-proposal under which another DEA agent, portrayed by Garcia as his wife, would hold the money and stay with the mobile man until the deal was consummated. On April 7, at yet another meeting, Messina said he would float that proposal by his primary source "right now, because he lives a couple of blocks from here." Messina then drove from the restaurant to Cicale's apartment and spent an hour there. The next day at another lunch meeting in Fort Lee, Messina told

Garcia that his source had rejected the new plan. He agreed, however, to raise it once again and said, "I'll talk to the guy. He's waiting for me, so let me go, and I am going to pick him up right now at the restaurant where he is at." Messina left and drove to a local restaurant where Cicale was waiting for him.

The following evening, April 9, Messina met DeSimone and Spector and leaving them at a Fort Lee shopping mall, proceeded on to a meeting with Agent Garcia. There, Messina explained that both the source and the mobile man had absolutely refused to do business with Garcia's "wife" and suggested as another alternative a series of smaller purchases. Messina agreed to meet Garcia the next day and said that if Garcia decided he was still interested in the deal, Messina would see his source and arrange the transaction for that day, April 10.

On April 10, Messina, Cicale and Spector were arrested and, three days later, DeSimone was also arrested.

DISCUSSION

1. *Error in the Geaney Finding*

Appellants Cicale, Spector, and DeSimone all claim that the non-hearsay evidence of their participation in the heroin distribution conspiracy was insufficient to establish their membership in the conspiracy. Accordingly, they assert, the admission into evidence under Fed. R. Evid. 801(d)(2)(E)—the co-conspirator exception to the hearsay rule—of Messina's various statements to Agent Garcia was improper. It is clear that statements by persons alleged to be co-conspirators may be considered by the jury only if the trial court is satisfied by a fair preponderance of the evidence that the defendant was in fact a member of the conspiracy. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). The standard for independent proof

of participation is "lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury," *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), *cert. denied* 102 S.Ct. 146 (1981), and the proof may be "totally circumstantial," *United States v. Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). Moreover, the trial court must view the evidence as a whole, rather than consider the individual pieces in isolation, *Geaney*, 417 F.2d at 1121; *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) and, once a conspiracy has been proved to exist, the evidence needed " 'to link another defendant with it [for purposes of a *Geaney* finding] need not be overwhelming...,' " *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir.), *cert. denied*, 430 U.S. 931 (1977). Indeed, as this Court has noted on previous occasions, all that is required to meet the *Geaney* threshold is " 'a showing of a likelihood of an illicit association between the declarant and the defendant,' " *United States v. Alvarez-Porras*, 643 F.2d at 57 (quoting *United States v. Ragland*, 375 F.2d at 477).

(a) *Cicale*

Appellant Cicale contends that the District Court erred in basing its *Geaney* finding as to Cicale on six statements by Messina. The statements in question were essentially of the same type: Messina indicated to Garcia that he was going to meet his source in order to obtain, or make arrangements to obtain, heroin and on each occasion, Messina was seen soon afterward with Cicale or arriving at Cicale's address.[2]

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[2]The six statements in question were as follows:

January 15, 1981:

"...he said he was going to talk to him right now..."

March 19, 1981:

"I'll go talk to one of my sources...He said he was going to go there as soon as he left me."

(Footnote continued on following page.)

Cicale argues that such statements are inadmissible hearsay and, therefore, cannot be used even by the trial judge to make a *Geaney* finding. We disagree.[3] Under Fed. R. Evid. 803(3), hearsay statements reflecting a declarant's intentions or future plans are admissible to prove subsequent acts. Were Cicale's participation in these acts proven only by such hearsay statements, a difficult issue would arise since the legislative history of Rule 803(3) in the House indicates an intent to prevent use of a declarant's statements as to future intentions to prove the acts of a third person. This would force us to join the debate about the merit and present vitality of *Mutual Life Insurance v. Hillmon*, 145 U.S. 285 (1892). We need not enter that debate, however, which is fully explored in 4 J. Weinstein & M. Berger, *Weinstein's*

(Footnote continued from preceding page.)

March 23, 1981:

" 'I'm going to drop by the guy's house that is providing this heroin the source of supply, right now...' "

March 25, 1981:

"At that time, we entered conversations concerning as how the deal would go down or the delivery would be made, so he says 'Look, as soon as I finish eating I'm going to go over to the guy's house'..."

April 7, 1981:

" 'I will go ahead and see them, you know, the primary source right now...He just lives a couple of blocks from here...I will go talk to him right now because he lives a couple of blocks from here...' "

April 8, 1981:

" '...I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at.' "

[3]As a consequence of the rationale we adopt, we need not decide whether Fed. R. Evid. 104(a) permits a *Geaney* finding based on hearsay which is inadmissible under the Federal Rules. Rule 104(a) specifically states the preliminary questions of admissibility are for the trial court and that it is not bound by exclusionary rules (other than privileges) in making that determination. Arguably, therefore, Messina's statements can be considered for *Geaney* purposes notwithstanding the hearsay rule.

Evidence Para. 803(3)[04]-[05] (1981),[4] for, while Messina's statements prove the nature of the transaction he was planning, Cicale's participation in that transaction is proven by independent evidence.

In *Hillmon,* one Walters had written that he was leaving Wichita on a trip with a man named Hillmon. This hearsay statement was used as the principal proof that Hillmon had actually traveled with Walters. Here, while Messina's statement indicates that he is about to engage in an illicit drug transaction involving another, Cicale's involvement is proven by independent non-hearsay evidence. That the nature of the transaction necessarily entailed the involvement of third parties surely does not limit use of Messina's statements to prove Messina's own acts. Statements by the declarant that he intend to carry out a plan are clearly admissible under 803(3), and, if a third party's participation is proven by independent evidence, the *Hillmon* issue does not arise. Rule 803(3) clearly allows the use of Messina's hearsay statements to show that he intended to engage in a transaction involving illicit drugs. Cicale's participation in that transaction is proven by eyewitness testimony. Even if the legislative history in the House accurately reflects congressional intent, therefore, Messina's statements were properly used to support the *Geaney* finding.

In so holding, we stop well short of the limits on the use of such hearsay established by our previous decisions. On three separate occasions, we have declined to hold that *Hillmon* statements illuminate only the actions of the declarant. *United States v. Mangan,* 575 F.2d 32, 43

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[4] While the Report of the House Judiciary Committee concerning Rule 803(3) (H.R.Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7075) purports to limit the *Hillmon* doctrine to the declarant's own future conduct, some commentators, e.g., J. Weinstein & M. Berger, 4 *Weinstein's Evidence* Para. 803(3)[04] (1981), prefer McCormick's flexible rule which allows a statement of intent to function as part of a "larger matrix of circumstantial evidence."

n. 12 (2d, cir.) *cert. denied,* 439 U.S. 931 (1978); *United States v. Moore,* 571 F.2d 76, 82 n.3 (2d Cir. 1978); *Stanchich,* 550 F.2d at 1297-98 n.1. On several other occasions we have recognized that *Hillmon* allows the implication to be drawn from a declarant's statement that he had "relations" with the other persons implicated which made his criminal plan "feasible," thereby rendering such statements admissible "to show the existence of a conspiracy" from which a third party's participation may be inferred. *Stanchich,* 550 F.2d at 1297-98 n.1, *United States v. D'Amato,* 493 F.2d 359, 363 (2d Cir.), *cert. denied,* 419 U.S. 826 (1974), *United States v. Annunziato,* 293 F.2d 373, 377-78 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961).

Cicale's own behavior, moreover,—his numerous conversations and meetings with Messina, *United States v. DiPalermo,* 606 F.2d 17 (2d Cir. 1979), *cert. denied,* 445 U.S. 980 (1980), his meetings with Messina at "critical junctures of the conspiracy," *United States v. Calabro,* 449 F.2d 885, 889 (2d Cir. 1971), *cert. denied,* 405 U.S. 928 (1972), his evasive driving on the nights of March 17 when he met Messina at the Tre Amici Restaurant and on March 22 after he and Messina met in East Harlem, *D'Amato,* 493 F.2d at 362, 365, his encoded conversations warning Messina not to "misshoot"—also connect him to the conspiracy for *Geaney* purposes. Messina's statements are thus supported by a "ring of reliability." *United States v. Cirillo,* 499 F.2d 872, 885 (2d Cir.), *cert. denied,* 419 U.S. 1056 (1974). As we stated in *Stanchich:*

> The mathematical chances that anyone not having an interest in [the conspiracy] would have engaged in the amount and nature of hovering and covering that [Cicale] did are infinitessimal. Judges are not required to exhibit a naivete from which ordinary citizens are free.

550 F.2d at 1300.

(b) *DeSimone*

DeSimone's actions provided abundant evidence that he had participated in the conspiracy to distribute heroin. On October 29, 1980, minutes after receiving an orange plastic bag of quinine from Garcia, Messina picked up DeSimone who rode a few blocks and then got out, bag in hand. From the brevity of the contact, it could be inferred that the sole purpose of the meeting was to transfer the quinine as part of the ongoing conspiracy. *See United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974). Moreover, Messina's statement that he was taking the quinine to his "man" and his later representation that his mobile man was a relative are admissible, in the context of other circumstantial evidence, to show DeSimone's participation in the conspiracy under the rationale outlined above as to Cicale. Indeed, DeSimone's own unguarded statement to Mrs. Messina that he was "working on a few deals" could reasonably be presumed to refer to illicit narcotics traffic, particularly since Mrs. Messina hastened to cut him off with a joke, doubtless to protect against the presence of the electronic surveillance which her husband suspected. Like Cicale, DeSimone acted furtively, *United States v. Gentile*, 530 F.2d 461, 465 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976), met with Messina at critical junctures in the conspiracy, *United States v. Calabro*, 449 F.2d at 889-90, and was in frequent association with other members of the conspiracy. This was more than sufficient to permit the trial court to infer that there was a "likelihood of illicit association" between Messina and DeSimone, *United States v. Alvarez-Porras*, 643 F.2d at 57 (quoting *United States v. Ragland*, 375 F.2d at 477), and that the *Geaney* threshold was met.

(c) *Spector*

Spector similarly questions the trial court's *Geaney* finding. Although Spector was in less frequent contact with Messina than the other conspirators, he too had

discussions with Messina at the most critical junctures of the conspiracy. *United States v. Calabro*, 449 F.2d at 889. This included the weekend of March 14 and 15 when Messina was attempting to secure one-eighth of a kilogram of heroin for Garcia. During that weekend, Spector said to Messina on the telephone, "that thing is not, is a little bit of a problem," words a jury might find are the "vague euphemisms and jargon [used by narcotics dealers] to describe their contraband," *United States v. DeSist*, 384 F.2d 889, 894 (2d Cir. 1967). Throughout the next few days, Spector met with Messina either directly before or directly after Messina's meetings with Garcia. Moreover, Spector used vague language and code words to designate his meeting places with Messina. As a final corroborating circumstance, Spector had on his person, at the time of his arrest, a piece of paper with the notation "John Mess 5,000" along with several other numbers. This could have been construed as a record of the criminal enterprise, be it division of profits or an account of monies owed. Based on this substantial evidence, Judge Conner properly admitted Messina's statements against Spector as those of a co-conspirator.

2. *Sufficiency of the Evidence*

Appellants challenge the sufficiency of the evidence supporting their convictions. Cicale argues that, even with the admission of Messina's hearsay statements, the total evidence did not support the jury's verdict. DeSimone and Spector, however, both urge the inadmissibility of Messina's statements and assert that once these are stricken from the record, the remaining evidence does not justify a finding of guilt. We have already held that Messina's statements are admissible. Those statements, taken in conjunction with the other evidence discussed in connection with the *Geaney* finding, are more than sufficient to meet the familiar standard of *Glasser v. United States*, 315 U.S. 60, 80 (1942), that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government to support it."

3. *Right to Counsel*

Cicale contends that he was denied the right to retain counsel of his own choice when the District Court refused to postpone the trial to a date when Cicale's lawyer, Gerald L. Shargel, was available. Cicale retained Shargel after his arrest and prior to his indictment on May 7, 1981. At a pretrial conference two weeks after the indictment was handed down, Judge Conner suggested that in view of the likelihood of pretrial motions, the earliest reasonable trial date—and the one he preferred—was early September. When Mr. Shargel informed the court that he would be tied up with another trial for the entire month of September, and Jay Goldberg, DeSimone's attorney, raised similar objections, the court set October 5 as the tentative trial date. On July 24, 1981, the court held a second pre-trial conference and again Mr. Shargel raised his September commitment, this time in response to Speedy Trial Act concerns on the part of another defendant who ultimately pled guilty. On September 4, in response to scheduling conflicts raised by Mr. Goldberg, Judge Conner pushed the trial date back eight days to October 13 and indicated, after Mr. Goldberg sought still more time, that this was a firm date.

Four weeks later, on October 2, Judge Conner was told by Mr. Shargel's associate that the other trial was going far slower than expected and would last another three weeks. When Judge Conner inquired if there were anyone else in the office who could try the case instead, the associate answered that he was the only other attorney in the office and not yet a member of the bar. Appellant Spector's attorney then raised a scheduling problem of his own, a trial set before Judge Pollack between October 23 and 26. Judge Conner's own calendar, as he announced at the conference, held five cases set for October 26, four for the following Monday, three for November 9 and three for November 16. In addition, he was scheduled to sit on the Court of Appeals for the week of November 30. Faced with these conflicting demands,

Judge Conner announced that no further delay could be granted and that if Shargel were unable to appear, Cicale should secure a new lawyer or accept court-appointed counsel.

On October 5, Cicale appeared personally to inform the court of his difficulties in obtaining counsel and again requested an adjournment. The court again refused to delay the case further. Cicale then retained counsel, Barry Scheck and Larry Vogelman, members of the Benjamin N. Cardozo Law School faculty. On October 13, at the beginning of the trial, Mr. Scheck moved for an adjournment explaining Mr. Shargel would be "the better lawyer." Nevertheless, he admitted each had spent three and a half days preparing with Cicale for trial and that they had received all of Mr. Shargel's plans and theories for the case.

While a criminal defendant has a right to counsel of his or her own choosing, e.g., *Powell v. Alabama*, 287 U.S. 45, 53 (1932), exercise of that right must at times give way to the need for a fair and efficient administration of justice. As we have noted, "where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other counsel." *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir. 1963) (citation omitted). The disposition of a request for a continuance is within the discretion of the trial judge and, absent abuse, the exercise of that discretion will not be disturbed. *Id.* at 935. Here, Judge Conner had to balance his own trial calendar and duties on the appellate court against the schedule of another judge as well as the interests of the original five defendants and their individual counsel. He had already yielded twice to his preferred choice of a trial date and had accommodated these factors as best he could in what was admittedly a difficult situation for all concerned. *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States ex rel. Carey v.*

Rundel, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). *Compare Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981) (trial judge's refusal of defense counsel's request for a two to three week adjournment held unreasonable where the court scheduled trial for 10 days after arraignment on one count of kidnapping and four counts of rape) *cert. denied*, 102 S.Ct. 1036 (1982). We hold there was no abuse of discretion in adhering to the trial schedule set.[5]

4. *Improper Comment on the Failure to Testify*

DeSimone asserts as error Judge Conner's remark in the course of an unrelated evidentiary ruling indicating that DeSimone intended to testify in his own behalf and could therefore clarify matters when he took the stand. When apprised of the fact that DeSimone did not and had never intended to testify, Judge Conner offered to give a curative instruction to the jury. After defense counsel ignored this suggestion and continued to argue another evidentiary issue, Judge Conner repeated his offer and asked DeSimone's counsel to advise him by the start of the next day's proceedings whether DeSimone wanted the curative instruction. The next morning, counsel declined the instruction, stating that he did not wish to call attention to the issue.

In the context of a nearly two week trial, Judge Conner's single inadvertent remark does not constitute prejudicial commentary sufficient to deprive DeSimone of a fair trial. *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir.), *cert. denied*, 429 U.S. 983 (1976); *see also United*

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[5]Cicale does not raise a claim of inadequate assistance of counsel. The record as a whole indicates that Messrs. Scheck and Vogelman, apprised as they were of Mr. Shargel's trial strategy and plans, were more than adequate to the task of Cicale's defense. The only claim of prejudice raised is that his lack of confidence in trial counsel influenced his decision not to take the stand in his own defense. We cannot now reconstruct what might have happened had Mr. Shargel tried this case but this claim falls far short of a showing of actual prejudice.

States v. Kaufman, 429 F.2d 240, 246-47 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970); *United States ex rel. D'Ambrosio v. Fay*, 349 F.2d 957, 961 (2d Cir.), *cert. denied*, 382 U.S. 921 (1965). In order to reverse a conviction for improper commentary on the right to remain silent, we must find that the comment was "manifestly intended or [was] of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Araujo*, 539 F.2d at 291 (citation omitted); *United States v. Rochan*, 563 F.2d 1246, 1248-50 (5th Cir. 1977). Judge Conner did not intend to comment on DeSimone's failure to testify; in fact, he was under the mistaken impression that DeSimone actually planned to testify. Moreover, unlike the case upon which appellant relies, *United States v. Davis*, 357 F.2d 438 (5th Cir.), *cert. denied*, 385 U.S. 927 (1966), the trial court did not repeatedly refer to the defendant's failure to testify nor did it imply to the jurors that they might draw a negative inference from DeSimone's silence. Instead, Judge Conner carefully and explicitly twice charged the jury that the defendants have no burden of proof and that no inferences might be drawn from their failure to testify.

Affirmed.

WARD, *District Judge*, concurring in part and dissenting in part.

Insofar as today's majority opinion affirms the convictions of appellants Frank DeSimone and Paul Spector, I concur.

I must dissent, however, from that portion of the majority opinion which holds that there was no error in the *Geaney* finding with respect to appellant Peter Cicale. The District Court based its *Geaney* finding as to Cicale on statements, by John Messina to DEA agent Eloy Garcia, which the District Court considered to be

"verbal acts." For the reasons stated hereinafter, I view that finding as erroneous, and would remand for reconsideration of the issue.

1. Messina's statements to Garcia were not "verbal acts." A "verbal act" is a statement which, *irrespective of its truth or falsity,* has legal significance, or which, *irrespective of its truth or falsity,* explains the legal significance of an otherwise ambiguous act. Thus, statements of intention, such as those at issue here, may qualify as verbal acts, but only where the defendant's *actual* intention is legally immaterial and where his *expressed* intention is legally decisive. In such a case, the words are not offered for their truth, but merely to show the fact of their expression, because the words are legally significant or give legal significance to ambiguous non-verbal conduct regardless of whether they are true. "This situation must be differentiated from the case where words which clarify an ambiguous situation are relevant only because they are offered for their truth." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* Para. 801(c) [01], at 801-69 (1981).

The instant case falls squarely in the latter category. The Government contends that the meetings between Messina and Cicale evidence Cicale's participation in the conspiracy. However, given the long-standing friendship between Messina and Cicale, and also Messina's contacts with numerous other drug dealers in the New York area, the Messina-Cicale meetings are not significantly probative of Cicale's participation in the conspiracy unless viewed in conjunction with Messina's prior statements to the effect that "I am now going to meet my source." The key point is that Messina's prior statements only give additional probative value to the subsequent meetings to the extent Messina's prior statements were true. That is, Messina's prior statements could properly be characterized as verbal acts only if, upon viewing the Messina-Cicale meetings in conjunction with these statements, one were able to conclude that the probative value

of the Messina-Cicale meetings with respect to Cicale's participation in the conspiracy does not vary depending on whether Messina's prior statements are thought to be true or false. Plainly, such a conclusion would be absurd; indeed, at oral argument the Government declined to urge that the Court take this view. To my mind, however, any application of the "verbal act" doctrine to the six statements in question would have to be predicated on this untenable conclusion.

This reasoning is entirely consistent with the law of the Circuit. In *United States v. D'Amato*, 493 F.2d 359, 364-65 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974), this Court held that a co-conspirator's statement that he was going to meet "his people" was "inadmissible hearsay" for the purpose of determining whether the *Geaney* standard had been satisfied as to a defendant with whom the co-conspirator met after making the statement. In *United States v. Stanchich*, 550 F.2d 1294, 1298 n.1 (2d Cir. 1977), this Court described *D'Amato's* analysis in this regard as "unquestionably correct." Moreover, *United States v. Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), does not call for a contrary result. To be sure, in that case this Court held that a co-conspirator's statement that he was going to meet his "friend" was properly considered by the trial judge in determining whether the *Geaney* standard had been satisfied as to a given defendant whom the co-conspirator subsequently met. *Manfredi's* holding has subsequently been explained by this Court as based, not on the "verbal act" theory, but rather on the ground that this hearsay had a "ring of reliability" which, under the circumstances warranted its consideration for *Geaney* purposes. *United States v. Cirillo*, 499 F.2d 872, 885 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). No such "ring of reliability" exists here. The record is replete with instances where Messina bragged about his "sources" and their ability to supply heroin, many of which proved utterly false.

2. ***Messina's statements to Garcia were not admissible against Cicale under Rule 803(3).*** The majority concludes that Messina's six statements to Garcia, while hearsay, were admissible against Cicale under Rule 803(3), and hence were properly considered by Judge Conner in making his *Geaney* finding as to Cicale.[1] I disagree. I accept the proposition that hearsay which is admissible against a defendant under an exception to the hearsay rule other than the co-conspirator exception may properly be considered by the trial judge in making his *Geaney* finding as to that defendant. *United States v. Cambindo Valencia*, 609 F.2d 603, 635 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). However, Rule 803(3) makes declarations of intention admissible to prove only the *declarant's* future conduct, and not (as had been allowed, prior to the adoption of the Federal Rules of Evidence, under the doctrine set forth in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892)) to prove the future conduct of another person.[2] *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Layton*, No. CR-80-416 RFP (N.D. Cal. Jan. 11, 1982); *see* H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973) ("the Committee intends that [Rule 803(3)] be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person"), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7087.

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[1] I observe that this theory was not urged by the Government either before the trial court or before us. The Government's decision not to rely on rule 803(3) at any juncture of these proceedings stands, in my view, as eloquent proof of that rule's inapplicability to the facts of Cicale's case.

[2] I recognize that this Court has, on three separate occasions, declined to rule whether Rule 803(3) limits the *Hillmon* doctrine in this manner. *See United States v. Mangan*, 575 F.2d 32, 43 n.12 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Moore*, 571 F.2d 76, 82 n.3 (2d Cir. 1978); *United States v. Stanchich*, *supra*, 550 F.2d at 1297-98 n.1.

Under Rule 803(3), then, while Messina's six statements to Garcia were arguably admissible, with a limiting instruction, against Messina *(but cf. United States v. Kaplan,* 510 F.sd 606, 610-11 (2d Cir. 1974), they remained in admissible hearsay as to Cicale. Accordingly, Rule 803(3) provides no basis for a holding that Judge Conner properly took Messina's statements into account in making his *Geaney* finding with respect to Cicale.

3. An appellate court may not review the "real" independent evidence and make its own Geaney finding. In affirming Cicale's conviction, the majority has determined to (1) disregard the six statements erroneously relied upon by Judge Conner, (2) look instead at the "real" independent evidence against Cicale, and (3) conclude that this evidence satisfies the *Geaney* standard. I reject this approach. The *Geaney* finding is a question of fact for the trial judge, *United States v. Nixon,* 418 U.S. 683, 701 n.14 (1974); *United States v. Kaplan, supra,* 510 F.2d at 612, and is reviewed on appeal by inquiring merely whether the independent evidence of the defendant-appellant's participation in the conspiracy provided a "reasonable basis," *see United States v. Doulin,* 538 F.2d 466, 471 (2d Cir.), *cert. denied,* 429 U.S. 895 (1976), or "reasonable grounds," *see United States v. Green,* 523 F.2d 229, 233 n.4 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976), for the trial judge's factual finding of the requisite "likelihood" of the defendant's participation in the conspiracy. As a result, where (as here) the district judge has misapplied the *Geaney* standard, it is not for the appellate court to make its own *Geaney* finding upon properly applying the *Geaney* standard. *United States v. Ziegler,* 583 F.2d 77, 80-81 (2d Cir. 1978). In my view, this is particularly so where (as here) the record strongly indicates that the trial judge's *Geaney* finding would have differed had he properly applied the *Geaney* standard. That is, the fact that Judge Conner thought it necessary to invoke the "verbal act" doctrine in order to find that the *Geaney* standard had been satisfied

as to Cicale strongly indicates that he found the "real" independent evidence insufficient to support such a finding with respect to Cicale. "Able jurists like Judge [Conner] do not seek out complexities for nothing. We must go on the premise that the [other] evidence failed to supply him with assurance sufficient to justify [finding that *Geaney* had been satisfied as to Cicale]." *United States v. Kaplan, supra,* 510 F.2d at 613. In short today's decision is nothing less than an unjustified exercise in appellate fact-finding that results in two votes for a verdict of guilt by association.

On the basis of the foregoing, I would remand this action insofar as Cicale is concerned, so that Judge Conner could make a *Geaney* finding as to Cicale without considering the six statements by Messina to Garcia. If he were to find that the *Geaney* standard has been satisfied as to Cicale, his decision would be subject to appellate review under the principles previously stated. If, on the other hand, he were to find that the *Geaney* threshold has not been crossed, Judge Conner would then have to reconsider Cicale's Rule 29 motion and either dismiss one or both counts of the indictment with respect to Cicale (if he were to grant the motion with respect to one or both counts) or order a new trial as to Cicale (if he were to deny any part of the motion).

Accordingly, I dissent from that portion of the majority opinion which holds that there was no error in the *Geaney* finding with respect to appellant Cicale.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second circuit, held at the United States Courthouse, in the City of New York, on the 16th day of November, one thousand nine hundred and eighty-two.

Nos. 82-1018, 82-1020, 82-1022

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER CICALE, FRANK DeSIMONE, PAUL SPECTOR, JOHN MESSINA, EDWARD MARTINEZ,
Defendants,

PETER CICALE, FRANK DeSIMONE, PAUL SPECTOR,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Peter Cicale.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Ward dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart
Chief Deputy Clerk

Appendix C
Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Cr. 306
(WCC)

UNITED STATES OF AMERICA,
Plaintiff,

- against -

PETER CICALE, PAUL SPECTOR and
FRANK DESIMONE,
Defendants.

Opinion and Order

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Appendix C
Opinion and Order of United States District Court

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CONNER, D. J.:

On November 2, 1981, the jury in this action returned a verdict convicting each of the three defendants of conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. § 846. In addition, Peter Cicale was convicted of distributing and possessing with intent to distribute heroin in violation of 21 U.S.C. § 841.

Prior to submission of the case to the jury, each defendant moved:

(1) to strike all hearsay statements made by alleged co-conspirators on the ground that the nonhearsay evidence failed to establish each defendant's participation in the conspiracy by a preponderance of the evidence, see *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), and

(2) for judgments of acquittal pursuant to Rule 29, F.R.Crim.P. The Court reserved decision on the motions until the present time. By this Order, each of the motions is denied.

The Court has reviewed the evidence against each of the defendants and is persuaded both that the nonhearsay evidence satisfied the *Geaney* threshold as to each defendant and that the evidence against each defendant was sufficient to sustain the convictions. This evidence

is summarized in the memoranda submitted by the Government in opposition to the motions, and need not be recounted here.

One issue, however, merits some discussion. The Government's satisfaction of the *Geaney* threshold as to Cicale was substantially dependent upon the admission into evidence, as nonhearsay, of six statements made by John Messina (originally a codefendant and an undisputed heroin dealer) to DEA Agent Eloy Garcia (at the time acting in an undercover capacity) through the testimony of Garcia. Each of the statements was to the effect that Messina would immediately or virtually immediately meet with his source of heroin, and in each case Messina was seen shortly thereafter meeting with Cicale or arriving at 2100 Linwood Avenue in Fort Lee, New Jersey, which is Cicale's residential address.[1] Cicale

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[1]The following chart indicates (1) the date of the conversation between Messina and Garcia and of the subsequent meeting or attempted meeting between Messina and Cicale, (2) Garcia's testimony as to the statements made by Messina to Garcia and the relevant trial transcript pages of Garcia's testimony, and (3) the relevant trial transcript pages containing the testimony as to surveillance of Messina meeting or attempting to meet with Cicale:

(1)	(2)	(3)
January 15, 1981	"...he said he was going to talk to him right now..." (118).	683-691 1006-1007
March 19, 1981	" 'I'll go talk to one of my sources'...He said he was going to go there as soon as he left me" (223).	741-743 1453-1455
March 23, 1981	" 'I'm going to drop by the guy's house that is providing this heroin, the source of supply, right now...' " (247).	750-751 1122-1125 1359
March 25, 1981	"At that time, we entered conversations concerning as how the deal would go down or the delivery would be made, so he says, 'Look, as soon as I finish eating I'm going to go over to the guy's house' ..." (260).	1456-1458

(Footnote continued on following page.)

contends that these statements are hearsay and cannot be considered in making the *Geaney* determination whether there is sufficient evidence of Cicale's participation in the alleged conspiracy. The Government argues that the statements are, in conjunction with the "contemporaneous" meetings or attempted meetings between Messina and Cicale, admissible not as evidence of the truth of the statements but as "verbal acts" explaining Messina's conduct, and thus may be considered as nonhearsay circumstantial evidence of Cicale's membership in the conspiracy.

Even if this court might otherwise be inclined to Cicale's position, two recent decisions of the Court of Appeals for the Second Circuit impel resolution of this issue in favor of the Government.

In *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), the Court considered a wiretap-recorded statement by a codefendant to his heroin customers that he would see his "friend" (narcotics connection) the following afternoon, coupled with an attempted meeting with defendant Joseph Manfredi at the indicated time, among the nonhearsay evidence establishing Manfredi's participation in the conspiracy under *Geaney*.

And in *United States v. D'Amato*, 493 F.2d 359, 363 (2d Cir. 1974), in considering whether the *Geaney* threshold had been met as to the defendant Abramo, the Court

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(Footnote continued from preceding page.)

April 7, 1981	" '...I will go ahead and see them, you know, the primary source right now...He just lives a couple of blocks from here...I will go talk to him right now because he lives a couple of blocks from here..." (298).	1408-1409
April 8, 1981	" '...I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at' " (302).	1458-1460

focused upon certain statements made by a co-conspirator (Burdieri) to an undercover DEA Agent (McElroy). The Court's summary of the evidence follows:

> "At a meeting on March 26, Burdieri and McElroy negotiated relative to the purchase of more heroin. Burdieri said 'his people' usually dealt only in four of five kilo quantities of heroin but would sell a half kilo for $12,500 and replied affirmatively to a question by McElroy as to whether they were 'the same people' who had furnished the February 20 heroin. They met, after several telephone calls and another meeting on the afternoon of March 27, once again on March 27 at 8:10 P.M., to consummate the purchase of a kilogram in their second transaction at a price of $28,000, Burdieri saying 'I've got to meet my people at 9 o'clock' that evening. After McElroy gave him the money and drove Burdieri around for a while so that he could count it, Burdieri was dropped at 23rd Street and Second Avenue. He left and then took a taxi, under considerable observation, to 36th Street and Third Avenue, where he entered a coffee shop at the southwest corner. At this point, a 1972 blue Lincoln Continental, registered to Mrs. Abramo, which had been waiting down the block, pulled up slowly along 36th Street going east toward the coffee shop and stopped on the opposite side of 36th Street from the shop. Appellant Abramo was driving the Continental, with D'Amato as his passenger. At exactly nine o'clock Abramo and D'Amato got out of the automobile. Burdieri came out, joined them, and the three of them entered the automobile." *Id.* at 362.

And in discussing the issue, the Court continued:

> "In Abramo's case, the sufficiency of the evidence independent of Burdieri's hearsay state-

ments presents us with a considerably more difficult decision. The independent evidence with respect to the March 27 transaction, viewed simplistically, shows only that after Burdieri had driven around in McElroy's automobile, counting the money that McElroy had brought with him, between 8:10 P.M. and 8:50 P.M., Burdieri took a taxi to a coffee shop, which was approached by Abramo and D'Amato in Abramo's automobile, the roundabout chase ensuing, with Abramo ultimately dropping off Burdieri and D'Amato.

"We say 'viewed simplistically,' because the foregoing represents an examination of the evidence without reference to any declaration of Burdieri whatsoever, and treats all of his declarations as inadmissible hearsay. Once we recall, however, that verbal acts -- contemporaneous utterances explaining nonverbal conduct or its tenor -- are not hearsay in the true sense, since they do not constitute an assertion to evidence the truth of a fact asserted, 6 Wigmore, Evidence § 1772, at 191 (3d ed. 1940), we can separate those declarations of Burdieri admissible for purposes of establishing the existence of a conspiracy for the sale of heroin and Abramo's membership therein, from those inadmissible to show his membership. *See* United States v. Costello, 352 F.2d 848, 853-855 (2d Cir. 1965), rev'd on other grounds sub nom., Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); United States v. Annunziato, 293 F.2d 373, 376-377 (2d Cir.), cert. denied, 368 U.S. 919, 82 S. Ct. 240, 7 L.Ed.2d 134 (1961); Shapiro v. United States, 166 F.2d 240, 242 (2d Cir.), cert. denied, 334 U.S. 859, 68 S.Ct. 1533, 92 L.Ed. 1779 (1948); see also Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 236 (1922).

"Burdieri's declarations that the price was $12,500 for one-half a kilo and $25,000 for a kilo help to explain his conduct in riding around in McElroy's car counting the money before he left for 36th Street and Third Avenue, as relating to the very transaction at issue; they give that conduct legal significance and they accompanied it. *See* cases cited in 6 Wigmore, *supra* § 1777, at 204 n.9; Terry v. United States, 51 F.2d 49 (4th Cir. 1931). From the previous transaction in which D'Amato, Zito and Burdieri were involved, together with the verbal acts of Burdieri in the negotiations for the sale of heroin, it may fairly have been inferred that there was on March 27, 1973, a conspiracy the object of which was the sale of heroin. On this point, certainly the Government was entitled to prove that Burdieri and McElroy were engaged in a transaction involving the sale and purchase of heroin which Burdieri was to obtain from someone and/or some place other than at 23rd Street and Second Avenue. Thus considered, that portion of his utterances to McElroy limited to establishing that a sale of heroin was to take place that evening may be considered as an item of circumstantial evidence in determining whether the preponderance test was met as to Abramo's membership in the conspiracy, even while Burdieri's declaration that he was going to meet 'his people' was for purposes of that determination inadmissible hearsay. Given the existence of a conspiracy to sell heroin in which Burdieri was a participant, we must try then, in measuring the role of Abramo, 'to perform the intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay' [as to Abramo being one of Burdieri's 'people']. United States v. Geaney, 417 F.2d at 1120. Assessing the evidence, we cannot say that

> it is insufficient to establish Abramo's participation by a fair preponderance, once we draw reasonable inferences from it, as the jury was entitled to do."

Id. at 363-64 (footnotes omitted).

Applying these principles here, the statements were properly admitted into evidence, although analytically in two stages. The six statements are each in the general form: "I'm going to see my source right now." Initially, the statements were inadmissible as evidence of their truth of the matter recited, *i.e.*, to prove that the person Messina met or attempted to meet was his source. However, as "verbal acts" considered in conjunction with the virtually contemporaneous conduct of Messina, the statements were admissible as nonhearsay evidence that Messina's conduct was related to his efforts to distribute heroin. The statements, even absent consideration of Messina's indication of who his source was, do help explain Messina's conduct in meeting with or attempting to meet with Cicale. Taken together, the nonhearsay aspects of the statements and the related actions of Messina are items of circumstantial evidence from which it could be inferred that Messina's contacts were members of the conspiracy. The fact that Messina met with or attempted to meet with Cicale on these six occasions is thus evidence which the Court could and did consider in determining that the *Geaney* threshold had been met as to Cicale.

Once the *Geaney* threshold had been surmounted, the statements were admissible as statements of a coconspirator, pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence, to prove the truth of the matter asserted, *i.e.*, that the man Messina would meet was his source for heroin.

The motions of the defendants to strike and for judgments of acquittal are accordingly denied.

SO ORDERED.

United States District Judge

Dated: New York, New York
November 23, 1981

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1184

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER CICALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient independent evidence of petitioner's participation in a narcotics conspiracy to warrant the admission against him of a co-conspirator's statements.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1184

PETER CICALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 691 F.2d 95.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1982. A petition for rehearing was denied on November 16, 1982 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on January 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to distribute heroin and to possess it with intent to distribute, in violation of 21 U.S.C. 846, and on one count of distribution and possession

with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of five years' imprisonment on each count to be followed by a three-year special parole term.[1] The court of appeals affirmed (Pet. App. 1a-29a).

1. The evidence at trial, which is detailed in the opinion of the court of appeals (Pet. App. 3a-14a), disclosed a conspiracy to distribute heroin in the New York City area. In late October 1980, an informant introduced undercover DEA Agent Eloy Garcia to co-defendant John Messina. Garcia stated that he wished to secure a regular supply of heroin for his "customer" in Chicago. Messina assured Garcia that he could sell him one-half kilogram of heroin every 10 days. In November 1980, Messina sold Garcia one-eighth kilogram of heroin for $30,000[2] and indicated his eagerness to continue doing business with Garcia. In December 1980, Garcia and Messina met for lunch and Garcia again pressed for assurances of regular deliveries of heroin. Messina bragged of having "five different sources of supply." Messina later offered a kilogram of heroin to Garcia on promise of a later payment, but Garcia declined, saying that he was not in the market for isolated purchases.

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[1]Co-defendants Paul Spector and Frank DeSimone, who were tried together with petitioner, were also convicted on the conspiracy count. Spector and DeSimone were sentenced to five and six years' imprisonment, respectively. Co-defendant John Messina pleaded guilty to the conspiracy count and to three substantive counts; he was sentenced to concurrent terms of ten years' imprisonment to be followed by a six-year special parole term. Co-defendant Edward Martinez, who pleaded guilty to conspiracy and to one substantive count, was sentenced to two and one-half years' imprisonment, to be followed by a three-year term of special parole.

[2]The government stipulated at trial that neither petitioner nor his co-defendants was the source of this heroin.

On January 15, 1981, Garcia and Messina met again for lunch and Garcia suggested that he give Messina's most reliable supplier $75,000 for heroin worth $50,000. The supplier would apply the $25,000 to Garcia's next heroin purchase, and could keep the money if Garcia did not order a further delivery within a week. Messina said he would "go talk with the guy," a supplier he was going to meet right away. Within the hour, Messina and petitioner were observed together in Messina's car. They spent the entire afternoon together and Messina met with no one else during the four and one-half hours he spent with petitioner. Later that afternoon, petitioner left Messina at a restaurant and drove Messina's car to an apartment building where he met an unidentified man. Petitioner then returned to the restaurant where he spoke briefly with Messina. The next day, Garcia met with Messina to carry out the deal. Garcia had $75,000 with him and Messina, for his part, was carrying a quarter kilogram of heroin. However, when Garcia saw that Messina was not accompanied by his source, he refused to complete the deal, stating that he was interested only in a permanent relationship and not in spot purchases.

In early March 1981, Garcia again pressed Messina for a commitment to provide a regular supply of heroin for Garcia's "Chicago customer." Messina promised to talk to "a couples of sources the next day." During the following week, Messina met or spoke with possible suppliers, including petitioner, co-defendants Paul Spector and Frank DeSimone, and convicted narcotics trafficker Anthony Todisco. On March 10, Messina reported to Garcia that one source with whom he had spoken that morning[3] was unwilling to meet with Garcia but that he had another source he could contact. That night Messina called petitioner and arranged

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[3]Messina met with co-defendant Spector on the morning of March 10.

to meet with him the following day. The next day Messina and Garcia met and made firm arrangements for a sale of three and one-half kilograms of heroin at a price of $770,000. Two days later, on March 13, Garcia met with Messina and requested one-eighth kilogram of heroin for his "Chicago customer." In an apparently fruitless effort to obtain the heroin, Messina visited petitioner's home, DeSimone's house and the home of another narcotics dealer.

Over the weekend, efforts to arrange the narcotics sale continued. At one point petitioner spoke to Messina and urged, "Don't mis-shoot whatever you do * * *." The efforts to arrange the sale were frustrated when one of the suppliers (Spector) reported that he was being followed. As a result, Messina told Garcia that he was unable to get the heroin for Garcia's "Chicago customer" because his "people" were being followed and were unable to go to the "stash pad" to pick up the heroin. On March 19, Messina told Garcia that he was still having trouble obtaining the heroin but that he had an alternative source. After meeting Garcia at a restaurant in Fort Lee, New Jersey, Messina stated, "I'm going to his house, he lives down the street here." Messina then drove directly to petitioner's apartment building but petitioner was not at home. Messina reported to Garcia that his source was not home and they drove into Manhattan, where Messina left Garcia at a restaurant and began visiting other restaurants that he had visited on other occasions with petitioner. At one point, Messina called home and told his wife, "I'm out looking for Peter like crazy. I can't find him anywhere." Later, Messina rejoined Garcia and reported that he had found his source, but the source was reluctant to do business because he was entertaining relatives from out of town. (Petitioner's brother-in-law was visiting the New York area at the time.)

On March 23, 1981, Messina visited petitioner's apartment building for 15 minutes and then met with Garcia. Messina told Garcia that the deal was on and that he was going to see his source "right now to make sure everything is squared away." Messina then returned directly to petitioner's apartment building. At 9:00 p.m. that evening, Messina went to a Harlem neighborhood he had visited the night before. Later that evening, Messina met Garcia and handed over one-eighth kilogram of 100% pure heroin in exchange for $30,000 in cash. Two days later, Messina told Garcia that the same "guy" who had supplied the heroin on March 23 would also supply the three and one-half kilograms of heroin that Garcia wanted. Messina stated that he would speak with his supplier right after lunch. Messina then went directly to see petitioner.

After several further meetings between Messina and Garcia, Messina proposed a plan for consummating the 3½ kilogram sale. Messina reported that the plan had been dictated by his source and included a "mobile man," or intermediary, who would hold the $770,000 until the transaction was completed. Garcia objected and two days later proposed an alternate plan in which a DEA agent, portrayed by Garcia as his wife, would hold the money and stay with the "mobile man." At a meeting on April 7, Messina told Garcia that he would pass along Garcia's proposal to his primary source "right now, because he lives a couple of blocks from here." Messina then went to petitioner's apartment, where he remained for an hour. The next day Messina told Garcia that his source had rejected Garcia's plan. Messina agreed to raise the issue again and said, "I'll talk to the guy. He's waiting for me, so let me go, and I am going to pick him up right now at the restaurant where he is at." Messina then left and drove to a local restaurant where petitioner was waiting for him.

The 3½ kilogram heroin deal ultimately fell through, and petitioner and his co-conspirators were arrested.

2. At trial, petitioner argued that testimony concerning Messina's conversations with Agent Garcia was not admissible against petitioner because there was insufficient independent evidence of petitioner's involvement in the conspiracy. The district court rejected this argument (Pet. App. 32a-40a). The court noted that on six separate occasions Messina told Garcia that he was on his way to meet his heroin supplier, and in each case Messina was seen shortly thereafter meeting with petitioner or arriving at petitioner's apartment house (*id.* at 34a-35a & n.1).[4] The district court

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[4]The six statements in question were as follows (Pet. App. 15a-16a n.2; *id.* at 34a-35a n.1):

> January 15, 1981:
> "he said he was going to talk to him right now."
>
> March 19, 1981:
> "I'll go talk to one of my sources. * * * He said he was going to go there as soon as he left me."
>
> March 23, 1981:
> " 'I'm going to drop by the guy's house that is providing this heroin the source of supply, right now.' "
>
> March 25, 1981:
> "At that time, we entered conversations concerning as how the deal would go down or the delivery would be made, so he says 'Look, as soon as I finish eating I'm going to go over to the guy's house.' "
>
> April 7, 1981:
> " 'I will go ahead and see them, you know, the primary source right now. * * * He just lives a couple of blocks from here. * * * I will go talk to him right now because he lives a couple of blocks from here.' "
>
> April 8, 1981:
> " 'I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at.' "

concluded (*id.* at 39a) that it could consider Messina's statements as independent nonhearsay evidence linking petitioner to the heroin conspiracy because the statements were admissible "verbal acts," demonstrating that Messina's virtually contemporaneous conduct was related to his efforts to distribute heroin.

The court of appeals agreed that the six statements were admissible, but on a different theory (Pet. App. 1a-29a). The court held that the statements were declarations of Messina's future plans and therefore were admissible under Fed. R. Evid. 803(3) to show that Messina intended to engage in a transaction involving illicit drugs (Pet. App. 14a-18a). The court of appeals noted that there was some question whether Rule 803(3) permits the use of a declarant's statements as to future intentions to prove the acts of a third person, but it concluded that it need not address the question because petitioner's participation in the transaction was proven by independent eyewitness testimony (Pet. App. 16a-18a).[5]

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[5]The court explained (Pet. App. 16a-17a; footnote omitted):

> Under Fed. R. Evid. 803(3), hearsay statements reflecting a declarant's intentions or future plans are admissible to prove subsequent acts. Were [petitioner's] participation in these acts proven only by such hearsay statements, a difficult issue would arise since the legislative history of Rule 803(3) in the House indicates an intent to prevent use of a declarant's statements as to future intentions to prove the acts of a third person. This would force us to join the debate about the merit and present vitality of *Mutual Life Insurance* v. *Hillmon*, 145 U.S. 285 (1892). We need not enter that debate, however, which is fully explored in 4 J. Weinstein & M. Berger, *Weinstein's Evidence* Para. 803(3)[04]-[05] (1981), for, while Messina's statements prove the nature of the transaction he was planning, [petitioner's] participation in that transaction is proven by independent evidence.

ARGUMENT

Petitioner contends (Pet. 23-26) that the court of appeals erred in reaching the conclusion that there was sufficient nonhearsay evidence of petitioner's involvement in the conspiracy to warrant the use against him of co-conspirator Messina's statements to Agent Garcia. In petitioner's view, the court of appeals was mistaken, first, in holding Messina's statements independently admissible against petitioner under Fed. R. Evid. 803(3) as statements of Messina's intent to engage in a heroin transaction, and, second, in relying on eyewitness accounts of petitioner's meetings with Messina as establishing petitioner's participation in the heroin conspiracy. These contentions are without merit.

1. Contrary to petitioner's assertion (Pet. 25), the court of appeals did not hold that Messina's statements were admissible against petitioner under under Fed. R. Evid. 803(3) to prove *petitioner's* future conduct. Rather, the court first concluded that the statements were admissible to prove that *Messina* was involved in a conspiracy to distribute heroin (Pet. App. 17a). The court then concluded that petitioner's participation in that conspiracy was shown through other evidence, including testimony concerning petitioner's numerous conversations and meetings with Messina, especially at critical junctures, petitioner's evasive driving on several occasions, and his use of code words in his intercepted telephone conversations with Messina (Pet. App. 17a-18a).

Moreover, petitioner's complaint (Pet. 25-26) that the court of appeals engaged in impermissible fact finding is wide of the mark. In holding that there was sufficient independent evidence of petitioner's participation in the conspiracy to warrant the admission against petitioner of all of Messina's statements to Agent Garcia, the court of appeals was not engaging in improper "fact finding." Instead, the court was simply applying uncontested facts adduced at

trial to support a particular legal conclusion. Petitioner does not claim that the meetings between petitioner and Messina, on which the court of appeals relied, did not in fact occur. Thus, the fact that the court of appeals based its ruling on a different legal theory from the one adopted by the district court — and that it relied on undisputed evidence in the record as support for that different theory —does not demonstrate that the court of appeals exceeded the scope of its authority. The court of appeals merely engaged in the permissible appellate function of relying on an alternative ground for affirming the lower court's ruling. See, *e.g., Brown* v. *Allen*, 344 U.S. 443, 459 (1953); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937).

2. The standard of independent proof of participation in a conspiracy is "lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury" (*United States* v. *Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), cert. denied, 454 U.S. 839 (1981)), and the proof may be "totally circumstantial." *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968). In determining whether the standard has been met, the court must view the evidence as a whole, rather than considering the individual pieces in isolation. See *United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). Moreover, once the existence of a conspiracy has been established, the evidence needed " 'to link another defendant with it [for purposes of determining the admissibility of co-conspirator statements] need not be overwhelming * * *.' " *United States* v. *Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980), quoting *United States* v. *Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977). Indeed, all that is required is " 'a showing of a

likelihood of an illicit association between the declarant and the defendant.' " *United States* v. *Alvarez-Porras, supra,* 643 F.2d at 57, quoting *United States* v. *Ragland, supra,* 375 F.2d at 477.

Here, the evidence was overwhelming that Messina was involved in a heroin conspiracy. The eyewitness observations of petitioner's meetings with Messina at critical junctures and of petitioners evasive actions apparently designed to defeat visual surveillance, together with the evidence of petitioner's intercepted telephone conversations with Messina, constituted weighty and reliable independent evidence linking petitioner to the conspiracy. Once petitioner was connected to the conspiracy, Messina's statements to Agent Garcia — including the statements that he was about to meet his source — were fully admissible against petitioner as statements in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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